


1 UNITED STATES BANKRUPTCY COURT
2 DISTRICT OF DELAWARE

3 IN RE: Chapter 11
4 W.R. GRACE & CO., et al., Case No. 01-01139(JKF)
Jointly Administered
5 Debtors.
6 June 27, 2005 (12:12 p.m.)
Wilmington

7 TRANSCRIPT OF PROCEEDINGS
8 BEFORE THE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE
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24 transcript produced by transcription service.
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BY 

1 THE COURT: Okay, W.R. Grace, Bankruptcy No. 01-
2 11396. Are the parties connected by phone?

3 UNIDENTIFIED SPEAKER: Yes.

4 THE COURT: Okay. I have telephonic appearances
5 listed by March Coleman, Tiffany Cobb, Michael Davis, Bruce
6 Levin, Elizabeth DeCristofaro, Jonathan Brownstein, David
7 Parsons, Jack Cohn, Allyn Danzeisen, Darrell Scott, Sarah
8 Edwards, Gary Becker, Edward Westbrook -- Mr. Bernick, but
9 he's here -- Jonathan Friedland, Lori Sinanyan, Michael Brown
10 -- Pardon me, is there a court call operator on?

11 TELEPHONE OPERATOR: Yes, there is.

12 THE COURT: There's some -- I don't know what it
13 is, but it sounds like noise or typing or background
14 something.

15 TELEPHONE OPERATOR: Okay.

16 THE COURT: Thank you. Michael Brown, Stafano
17 Calogero, Barbara Seniawski, and Christopher Candon. I
18 apologize for not pronouncing all the names properly. I'll
19 take entries of appearances from those of you in court,
20 please.

21 MR. BERNICK: David Bernick for Grace and with me
22 is Janet Baer, David Carickhoff, and Jonathan Friedland.

23 MR. PASQUALE: Kenneth Pasquale from Stroock &
24 Stroock & Lavan for the Creditors Committee.

25 MR. HURFORD: Mark Hurford of Campbell & Levine on

1 behalf of the Asbestos PI Committee along with Ron Reinsel
2 from Kaplin & Drysdale.

3 MR. BAENA: May it please the Court. Good
4 afternoon, Judge. Scott Baena and Jay Sakalo on behalf of
5 the Property Damage Committee.

6 MR. FRANKEL: Good afternoon, Your Honor. Roger
7 Frankel for David Austern the Future Claimants
8 Representative.

9 MR. CHEHI: Good afternoon, Your Honor. Mark Chehi
10 from Sadden Arps, and I have here my partner, Henry
11 Wasserstein from our New York office to address the Sealed
12 Air settlement matter.

13 MR. SULLIVAN: Good afternoon, Your Honor. Bill
14 Sullivan, Delaware counsel for the ZAI claimants.

15 THE COURT: Mr. Bernstein. I'm sorry, I don't know
16 where that came from, but --

17 MR. BERNICK: Well, Donald Bernstein was a
18 classmate of mine in law school, but --

19 THE COURT: I apologize.

20 MR. BERNICK: Your Honor, there's a relatively
21 lengthy agenda, but I think many of the matters are
22 uncontested or administrative in nature. There are two
23 substantial matters: One is the motion to extend
24 exclusivity, and the second is the matter of the case
25 management order in connection with the property damage

1 claims. Ms. Baer will be addressing all of the matters up to
2 those last two matters, and I'll address the Court with
3 respect to those last two matters. So, if we can proceed on
4 that basis?

5 THE COURT: All right.

6 MR. BERNICK: Ms. Baer with address the Court.

7 MS. BAER: Good afternoon, Your Honor. Your Honor,
8 with respect to agenda item number 1, which was the motion of
9 the Massachusetts Department of Environmental Protection from
10 relief from the stay, as you may recall there was a setoff
11 issue there. The Massachusetts Department of EPA has filed a
12 notice of withdrawal of their motion, and that can now be
13 taken off the calendar. It is now moot.

14 THE COURT: All right, thank you.

15 MS. BAER: Your Honor, item number 2 is the second
16 supplemental application of David Austern, the Future
17 Claimants Representative to extend the terms of the
18 employment of CIBC World Markets Corp. A certificate of no
19 objection was filed on that matter.

20 THE COURT: Yes, I have CNOs on items 2, 3, and 4.
21 I have not had an opportunity to get the orders entered -- I
22 know there are others, but just looking briefly at the
23 agenda, on items 2, 3, and 4, those orders will be entered.

24 MS. BAER: Your Honor, with respect to items 3 --
25 Item number 3 I do have the order here in court. If it would

1 be helpful, I can hand it up and we can get it entered right
2 now. I don't know what that will do to you procedurally.

3 THE COURT: It's probably easier if I just indicate
4 that they should all be entered electronically, Ms. Baer, but
5 I'll find out and get back to you as soon as Mona lets me
6 know how they prefer it.

7 MS. BAER: Your Honor, that takes us to item number
8 4, which was the motion of the debtors for authority to
9 retain its former general counsel David Seagel as a
10 consultant. Your Honor, we submitted a certificate of
11 counsel on that one. There was one inquiry. The Asbestos
12 Property Damage Committee asked us if we would supply them
13 with a monthly statement of Mr. Seagel's hours. We indicated
14 we would do so, in fact, it's a monthly statement that will
15 indicate his hours as well as a little breakdown of the
16 different matters he's working on. With that, Your Honor, we
17 revised the order to include providing that to all of the
18 committees, not just the PD Committee, as well as the U.S.
19 Trustee and would ask that that order be entered.

20 THE COURT: Yes, 4 can be entered. Okay, 2 and 3
21 apparently are already in progress of being entered, and 4
22 will be now, so. Okay, with respect to 5, if you have the
23 order here, I'll take that one.

24 MS. BAER: I do.

25 THE COURT: Thank you. Okay that's entered.

1 MS. BAER: Your Honor, item number 6 you already
2 entered that order. That was on the Lake Charles Union
3 Pension Plan.

4 THE COURT: All right.

5 MS. BAER: That takes us to item number 7, Your
6 Honor, which is the quarterly fee applications. I believe
7 that the Asbestos Property Damage Committee filed a response
8 to the fee examiner's report, and I will turn the podium over
9 to them.

10 THE COURT: Mr. Baena.

11 MR. BAENA: May it please the Court. Scott Baena
12 on behalf of the Property Damage Committee. Judge, I hate to
13 take up the Court's valuable time on a matter that doesn't
14 entail a lot of money. And that certainly is the case in
15 respect of this objection, if you will, or recommendation by
16 the fee examiner in respect of our fees. However, we thought
17 the point was an important one, and from time to time, people
18 have been bringing these kinds of points to the Court, and we
19 thought this was just such an instance where we should talk
20 to the Court again. Judge, we thought it was very sensible
21 and thoughtful, early in this case, to insure that there was
22 going to be within our firm a consistent number and array of
23 people involved in this matter. We think that by that
24 consistency, you minimize the expense of the representation
25 by the efficiencies that you create over time, and the

1 familiarity that people have that they gain over time. And
2 amongst the professionals that that applies to, in the case
3 of our firm, are paraprofessionals who are valued members of
4 our restructuring and insolvency team, who are highly
5 skilled, indeed some of them have even graduated law school,
6 and we have asked them to do a number of things including,
7 which we thought was of paramount importance, avoiding the
8 necessity for every one of the lawyers who's involved in this
9 case to review every pleading. And we have them parse out
10 the pleadings to the various people based upon subject
11 matter, based upon prior involvement in the type of subject
12 or subject matter that is the matter engendered by the
13 pleadings. Indeed, if you review the monthly and quarterly
14 bills submitted by my firm, you'll see that I have very
15 little time, personally, that's billed for reviewing
16 pleadings, and it's because of this process that we employ
17 that insures that matter is assigned to the right person for
18 further handling. We note and commend Kirkland & Ellis for
19 the same process, indeed, we suspect a number of firms
20 involved do. But for some reason, the Kirkland firm and our
21 firm are the only two firms that were singled out on this
22 particular occasion for these charges, which again, are not a
23 lot of money. I think in the case of Kirkland it was \$6,000
24 on a \$2 million quarterly fee app, and in our case it was
25 \$4,000 on a \$200,000 fee app. The examiner's position on

1 this is that the function of these paraprofessionals is
2 ministerial. And nothing could be further from the truth
3 unless we don't understand what he means by ministerial. We
4 think it makes entirely good sense to create efficiencies
5 wherever we can, and that would include expanding the use of
6 paraprofessionals to insure that we don't duplicate the
7 delivery of legal services by lawyers within the law firm,
8 and that's what this dispute is all about.

9 THE COURT: Anyone present for the fee examiner?

10 MR. SMITH (TELEPHONIC): Yes, Your Honor, this is
11 Warren Smith, the fee examiner.

12 THE COURT: Go ahead, Mr. Smith.

13 MR. SMITH (TELEPHONIC): I do not dispute anything
14 that was just said. However, that's not what this dispute is
15 about, Your Honor. The dispute is not about efficiencies nor
16 is it about having paralegals parse their pleadings and
17 allocate out those pleadings that should be read by certain
18 people. If you note Exhibit A to our final report regarding
19 Bilzin, Sumberg, it identifies a number of charges, and yes,
20 these were all charges or fees that were incurred by
21 paralegals, but we don't -- we did not categorically deny or
22 recommend disallowance of the fees by these paralegals. It
23 was just for those services where we felt that these
24 paralegals were going across the line and doing essentially
25 secretarial tasks. If you look on Exhibit A, Your Honor, to

1 again, our final report regarding Bilzin, Sumberg, on
2 12/17/04 the timekeeper identified as BAB billed for,
3 quote, "create shipping label and send via Fed Ex", and,
4 quote, "create labels for folders and redwell to insert
5 pleadings". A lot of the other charges on Exhibit A are for
6 printing documents, and so, Your Honor, we have no objection
7 to paralegals performing the tasks for which paralegals are
8 appropriate, and I think it was very eloquently explained how
9 paralegals can be used efficiently. However, some of these
10 charges we believe that were in this application involve
11 paralegals performing tasks for which secretaries are more
12 appropriate, and those are the charges to which we
13 recommended disallowance, Your Honor.

14 THE COURT: Okay, Mr. Baena?

15 MR. BAENA: I'm going to let Mr. Sakalo, if you
16 don't mind, talk about the specific charges.

17 THE COURT: All right, Mr. Sakalo.

18 MR. SAKALO: Good afternoon, Your Honor. Your
19 Honor, with respect to the two particular charges that Mr.
20 Smith just raised, he is correct as to those two, but if you
21 look at the rest of the specific charges listed in his
22 Exhibit A, that is the project that Mr Baena was explaining
23 before. That is what our paraprofessionals, we call project
24 assistants, do on a daily basis for us in managing the
25 pleadings that come in. The descriptions of them perhaps

1 aren't as descriptiveness as Mr. Smith might wish, and we did
2 include in our initial response to his initial report a
3 description of what they do in more detail, and he again
4 didn't find that to be persuasive, and Mr. Baena just
5 specified exactly what it is that our paraprofessionals do,
6 and we believe, in accordance with what other firms in this
7 case are doing, other firms in Delaware are doing on these
8 mega cases, that these are compensable activities.

9 THE COURT: Well, what other firms are doing in
10 Delaware may or may not be the issue. What you do with your
11 non-bankruptcy clients may be more of an issue. I mean
12 that's what busy beaver tell me.

13 MR. SAKALO: This is something that we do -- have
14 instituted in our litigation group for mega cases, as well,
15 Your Honor, this is not something that we --

16 THE COURT: Well, what other cases? Do you have
17 mega-non-bankruptcy cases? I mean where's the comparison
18 that I have to follow?

19 MR. SAKALO: Yes, yes, Your Honor. Our litigation
20 matters that are pending where we have electronic filing,
21 this is something that we've instituted throughout our firm
22 for all of our cases, and it's something that's regularly
23 charged to our clients.

24 THE COURT: What are the nature, for example,
25 subject matter-wise of other mega cases that are not

1 litigation -- or are not bankruptcy cases?

2 MR. SAKALO: For instance, we're defending a
3 fraudulent transfer action pending in the Southern District
4 of Ohio where there is, you know, on any given day five, six,
5 seven, eight different pleadings that are filed in that
6 action, and our paraprofessionals do the same type of work on
7 those cases. We have pending actions in New York. Other
8 actions in Delaware, we do this as well. Those are on non-
9 bankruptcy matters, Your Honor.

10 THE COURT: Okay, I will take a look at this after
11 court and decide when I have a chance to review each specific
12 item as to whether I think it's appropriate. Frankly, the
13 fact that somebody's creating a label, should not be charged
14 the paralegal rates -- at the highest paralegal rates. It
15 just shouldn't be.

16 MR. SAKALO: We agree with --

17 THE COURT: In fact, it shouldn't be charged at
18 all.

19 MR. SAKALO: We agree. That particular entry, we
20 overlooked that one, and we agree as to that one, but you'll
21 see on Exhibit A, that's the only entry of that nature.

22 THE COURT: All right. I will take a look at
23 Exhibit A later and make a decision. Okay.

24 MR. SAKALO: Thank you, Your Honor.

25 MR. SULLIVAN: Good afternoon, Your Honor. Bill

1 Sullivan on behalf of the ZAI claimants. Your Honor, I rise
2 only because in reviewing the certification of counsel this
3 morning with respect to the quarterly fees, I noted that it
4 omitted the new firms of both Darrell Scott and myself. We
5 both changed firms last fall during this fifteenth quarterly
6 period, and I have not had a chance to raise that issue with
7 Mr. Smith yet because I only caught it this morning. So,
8 Your Honor, I would like the opportunity to review that with
9 Mr. Smith and find out what happened with respect to the two
10 new firms.

11 THE COURT: Okay. That makes sense. Mr. Smith,
12 did you get the fee applications properly? Is it just that
13 somehow or other they were deleted from the order?

14 MR. SMITH (TELEPHONIC): Your Honor, I think we'll
15 have to discuss this off the record, Your Honor.

16 MR. SULLIVAN: This would be the first quarter that
17 the new firms would have appeared, Your Honor, so, you know,
18 I'll work it out with Mr. Smith, and we can advise the Court.

19 THE COURT: Well, you need to advise whoever is
20 preparing the order. The fee applications were properly
21 filed and served and Mr. Smith has reviewed them? They're
22 just missing from the order?

23 MR. SMITH (TELEPHONIC): Well, okay. Your Honor,
24 we've not reviewed them. The reason that we have not
25 reviewed them, I don't know.

1 THE COURT: Okay. I'm sorry, Mr. Sullivan, who are
2 you representing? ZAI plaintiffs.

3 MR. SULLIVAN: ZAI, yes.

4 THE COURT: Okay. Has there been an order that
5 appoints counsel for ZAI plaintiffs? Have you been
6 substituted formally on the record?

7 MR. SULLIVAN: Your Honor, I have been and my prior
8 firm I was billing and was paid, and then when I changed
9 firms, we reviewed that with Grace and his counsel, and
10 everybody agreed that it fell within the prior order, so,
11 that we would continue to be paid at my new firm as Delaware
12 counsel. So, it is subject to an existing order, Your Honor.

13 THE COURT: Well, I don't know how I get you paid
14 if you're not on the record anyplace in the new firm. I
15 mean, I need an order that appoints you in the new firm;
16 don't I?

17 MR. SULLIVAN: Your Honor, we reviewed this in
18 February, and the initial appointment order for both Mr.
19 Scott and myself identified us personally and therefore --

20 THE COURT: That's fine, but don't I need a new
21 firm and a new address somewhere on the record in order to
22 know -- I mean, if you haven't made that substitution, our
23 records aren't even going to be sending you pleadings in the
24 correct place.

25 MR. SULLIVAN: We made those substitutions, Your

1 Honor. I mean we've been receiving pleadings, we filed the
2 notice --

3 THE COURT: Okay. I was trying to get to whether
4 or not the record was correct as to where you are now lodged.
5 So the order that appointed you referred specifically to you
6 and Mr. Scott --

7 MR. SULLIVAN: Right.

8 THE COURT: -- not to your firm.

9 MR. SULLIVAN: Right.

10 THE COURT: Okay. So that's not an issue.

11 MR. SULLIVAN: That's my understanding, Your Honor.

12 We had discussions and worked that out, and in fact the
13 monthlies have been paid, as I understand it, from this
14 quarterly period. So -- Your Honor, I guess -- counsel
15 suggested, if we just discuss it with Mr. Smith and either
16 submit a new order or a revised order with respect to these
17 two firms.

18 THE COURT: Yeah, well, he has to review them
19 obviously, so yes, I need to get an order that deals with
20 these two issues, and I'm going to have to make a ruling on
21 Mr. Baena's anyway, so, it's going to take me a little bit of
22 time to figure out what the fees are going to be. So, who is
23 submitting in this case; is it Mr. Smith or is it the debtor
24 that's preparing these orders?

25 MR. CARICKHOFF: Your Honor, David Carickhoff on

1 behalf of the debtors. Mr. Smith has been giving us the
2 attachment to the omnibus order. I've always drafted the
3 order itself but the Exhibit A which sets forth the requested
4 fees and the examiner's recommendation has always been
5 prepared by the fee auditor.

6 THE COURT: Okay, well, that portion, Exhibit A,
7 except for Mr. Baena and I guess this issue Mr. Sullivan's
8 raising can be entered. So, perhaps what I can do is get a
9 partial order entered with respect to everybody who's agreed
10 with his recommendations, and then a supplemental order once
11 you've come to some agreement with respect to those fees. So
12 --

13 MR. CARICKHOFF: I guess the order that we have to
14 hand up to Your Honor that was submitted under certification
15 of counsel, Your Honor can strike or put a notation in it
16 that Mr. Baena's firm's fees are under advisement, and I
17 think everybody else can go forward, and Mr. Sullivan can
18 submit a certification of counsel with respect to his fees
19 and Mr. Scott's firm's as well.

20 MR. SULLIVAN: I would be glad to do that, Your
21 Honor.

22 THE COURT: Mr. Baena, how about -- if you're
23 telling me that the issue that is contested is \$4,000, so
24 that I don't hold up your whole fee, how about if I award all
25 but the \$4,000 that's contested, and then we can do a

1 supplemental later.

2 MR. BAENA: That's fine.

3 THE COURT: All right. Can you fix this order
4 before you hand it up.

5 MS. BAER: That's what's in there.

6 THE COURT: It is in there now?

7 MR. CARICKHOFF: The recommended amount does not
8 include the 4,000 that's in dispute.

9 THE COURT: All right. So everybody's fees are
10 okay except that Mr. Sullivan's aren't in there, and Mr.
11 Baena's I need to address the \$4,000 worth. Is that correct?
12 Okay. Let me make a note so I know what I'm doing here.

13 MR. SULLIVAN: And, Your Honor, with respect to my
14 fees, I'll also do it on behalf of Mr. Scott.

15 THE COURT: Okay, that's fine. I'm sorry, what
16 agenda number is this? I'm sorry.

17 MS. BAER: It's agenda number 7.

18 THE COURT: Seven, thank you.

19 MS. BAER: And I have the order here, Your Honor.

20 THE COURT: All right. So, on Sullivan and Scott
21 fees, I'm going to get a certification of counsel after, Mr.
22 Smith, you've had an opportunity to review them.

23 MR. SMITH (TELEPHONIC): Yes, Your Honor.

24 THE COURT: All right, so, in this instance, with
25 respect to Sullivan and Smith, I will need an order on a

1 certification of counsel that Mr. Sullivan will prepare.

2 This one won't be coming from the debtor; is that correct?

3 MS. BAER: That's correct.

4 THE COURT: All right, and Mr Baena, I'll give you
5 a ruling so there will be some order that will be entered
6 with respect to that.

7 MR. BAENA: Thank you, Your Honor.

8 THE COURT: Okay. I'll take the order now, Ms.
9 Baer. Thank you. Okay, that order is entered.

10 MS. BAER: Your Honor, agenda item number 8 is
11 exclusivity which we'd like to skip for now while we get
12 these other matters taken care of.

13 THE COURT: That's fine.

14 MS. BAER: Agenda --

15 MR. SMITH (TELEPHONIC): Your Honor, this is Warren
16 Smith. If I could be excused?

17 THE COURT: Yes, sir, thank you.

18 MR. SMITH (TELEPHONIC): Thank you, Your Honor.

19 MS. BAER: Your Honor, agenda item number 9 is the
20 debtor's fourth omnibus objections to claims. There was one
21 matter left, the contested matter of Spaulding & Slye. The
22 parties have reached an agreement on that settlement, and I
23 have a stipulation and agreed order here for your execution.

24 THE COURT: All right, what's the settlement?

25 MS. BAER: Your Honor, the claim has been settled

1 for \$1,250,000 and no interest even if the plan ultimately
2 calls for interest to be paid. That is a set and firm amount
3 that will not change.

4 THE COURT: All right. Has this been circulated?
5 Okay. For the record, I don't know if they picked you up.
6 You said it was sent to the Unsecured Creditors Committee.

7 MS. BAER: Yes, we've been in consultation with the
8 Unsecured Creditors Committee on this. They have seen this
9 order, and they do know the details of the settlement.

10 THE COURT: All right, that order is entered.

11 MS. BAER: Your Honor, agenda item number 10, the
12 debtor's fifth omnibus objections to claims. There are a few
13 contested claims left over on the exhibit, and we're asking
14 that this be continued to next month.

15 THE COURT: All right. Okay, that's entered.

16 MS. BAER: Your Honor, agenda item number 11 is the
17 debtor's eighth omnibus objections to claims. There are
18 three contested claims left, and we're asking those be
19 continued to next month.

20 THE COURT: Thank you. That order's signed.

21 MS. BAER: Agenda item number 12, the debtor's
22 ninth omnibus objections to claims. On this matter, Your
23 Honor, there are no responses and the order is adjudicating
24 some of the matters and continuing a couple of them where
25 there were issues.

1 THE COURT: All right. Thank you. That's signed.

2 MS. BAER: Your Honor, agenda item number 13, the
3 debtors' tenth omnibus objections to claims a non-substantive
4 objection, we received no responses and all of the matters on
5 there have been resolved according to the order.

6 THE COURT: Okay. Thank you. Okay, that's signed.

7 MS. BAER: Agenda item number 14, the debtors'
8 eleventh omnibus objections to claims. This was a non-
9 asbestos Gateway objection. We received no responses. We
10 have received some contact. Some of the matters have been
11 resolved. Some of them are being continued, and there's one
12 stipulation that's attached. It does not call for Court
13 signature. It's just a stipulation resolving that claim.

14 THE COURT: All right. Thank you. That's signed.

15 MS. BAER: Your Honor, that takes us to agenda item
16 number 15, which is the joint motion of Sealed Air and the
17 Asbestos Committees for entry of the Sealed Air settlement
18 agreement. Your Honor, I'm sure that Sealed Air would like
19 to present this matter to the Court, but I'm pleased to
20 submit to the Court that we are all in agreement on the order
21 to approve the settlement agreement.

22 THE COURT: Okay.

23 MR. WASSERSTEIN: Good afternoon, Your Honor.

24 Henry Wasserstein from Skadden Arps on behalf of the Sealed
25 Air Corporation defendants in the adversary proceeding. Your

1 Honor has before her the renewed motion that has been made to
2 approve the settlement together with the response that was
3 submitted by the debtors on April 24. So Your Honor should
4 have everything that has occurred up until April 24. If Your
5 Honor would care for me to do so, I can briefly summarize the
6 chronology of events that occurred up until that time.
7 They're all in those papers. There's nothing new there.

8 THE COURT: They are in the papers, and it's not so
9 much the chronology that I'm confused about, it's who's who
10 in the zoo. I'm not really sure what the purpose of or the
11 relationship and the affiliation between the parties such
12 that they're going to be entitled to a 524(g) injunction is,
13 under this settlement, nor am I sure how if the debtor, for
14 example, loses exclusivity and/or it doesn't have the plan
15 that's proposed, how this settlement can be effectuated and
16 why we're going through this exercise now.

17 MR. WASSERSTEIN: Your Honor, as I understand it,
18 the plan that the debtors have submitted, the keystone to
19 that is the settlement agreement between Sealed Air and the
20 two Asbestos Committees. If the settlement agreement is not
21 ultimately approved, Sealed Air would have the ability to
22 walk away from the settlement agreement and be in whatever
23 position it would otherwise be. So certainly in connection
24 with that plan, with that proposed plan, the Sealed Air
25 settlement agreement is very significant. Also, given the

1 amount that is involved in this, ultimately it is something
2 that needs to be resolved independent of whatever plan the
3 Court ultimately approves because we're talking here of an
4 amount that today approaches a billion dollars based upon the
5 current value of the Sealed Air stock that is part of the
6 package. With regard to the existence of the 524(g) trust
7 issue, all that is being done here is taking any potential
8 exposure that Sealed Air would have as a result of debtors'
9 asbestos liabilities and shielding those. There are no other
10 asbestos liabilities that the Sealed Air defendants have.
11 It's all derivative of their relationship with the debtors
12 and the acquisition of the Cryovac business spec, I guess, in
13 1998. So that's why this is something that we believe needs
14 to be addressed and now would be an appropriate time to do
15 it.

16 THE COURT: All right.

17 MR. WASSERSTEIN: Do you need me to go over the --
18 Well, you said you understand the prior events. Is there a
19 reason for me to go over that?

20 THE COURT: I don't think so --

21 MR. WASSERSTEIN: Okay.

22 THE COURT: -- unless there's something that you
23 think really needs to be brought to my attention.

24 MR. WASSERSTEIN: There really isn't. I think
25 really what ought to be done is to go forward from April 24

5 THE COURT: All right.

8 THE COURT: All right. Thank you.

9 MR. WASSERSTEIN: The April 24 submission of W.R.
10 Grace basically stated that they did not object to the
11 approval of the settlement agreement. They characterize the
12 payment as a -- they characterize it as being a principal
13 part -- a significant part of their proposed plan of
14 reorganization, and that, quote, "This payment is critically
15 important in order to achieve confirmation of the plan,"
16 close quote. They also noted that even though they were not
17 parties to the settlement agreement, that they intended to
18 comply with the settlement agreement. The settlement
19 agreement is based upon two things: (a) -- from the Sealed
20 Air's point of view -- it's based upon (a) the establishment
21 of the 524(g) trust and the appropriate injunction, and (b)
22 an attempt to get the best possible tax situation for Sealed
23 Air for the payments that it is making. And that requires
24 some cooperation for W.R.Grace. The settlement agreement
25 required the Asbestos Committees to use their best efforts to

1 have a plan confirmed that provided for these types of
2 things. The debtors have indicated that they have no problem
3 with that, and they did that in that document. What the
4 debtors were concerned about was the possibility that they
5 would be required to take some action that would expose them,
6 their officers and directors to potential exposure, either
7 civilly or criminally. They also indicated in their papers
8 that they understood that the way the settlement agreement
9 currently existed and the way the law currently existed that
10 that was not a problem today. So, essentially what we did
11 over a period of time, and we've had extensive conversations,
12 communications, we asked for one month extension to try to
13 work out what we did, and we were able to work it out.
14 Everything that is done is set forth in paragraph (4) of the
15 proposed order, and that appears on the fifth page of the
16 document. And essentially, paragraph (4) does three things:
17 First of all, it reflects debtors' agreement that they're
18 going to comply with the settlement agreement, and indeed, it
19 directs them to comply with that agreement. Second, it
20 provides that wherever the settlement agreement calls for the
21 Committees to use their best efforts to have Grace take
22 action or refrain from taking action that the debtors will do
23 that, will take that action or refrain from that action. And
24 finally, it provides a slight modification of the provision
25 that had been proposed in the April 24 memorandum submitted

1 by Grace. What it provides is, is that if there is a change
2 of law as that term is defined in the settlement agreement,
3 that occurs after the date that Your Honor signs an order
4 approving the settlement agreement, then W.R. Grace, the
5 debtors' Sealed Air, the Committees, whoever would be
6 required to take an action or refrain from taking an action
7 as a result of a change of law after the date the order is
8 signed would be absolved from having to take such action or
9 refrain from taking that action. So in effect, what it does,
10 is it takes the provision that debtors were proposing and
11 just moves it forward to after an order is signed. Those are
12 the only changes that appear in the proposed order that
13 differ from the order that had previously been presented to
14 the Court, other than a renumbering of paragraphs and some
15 typographical changes. We circulated this proposed order to
16 the debtors, the Asbestos Committees, the Unsecured Creditors
17 Committee, the Equity Committee, the Futures Representative,
18 and the United States Trustee. We have received no
19 objections from anyone with regard to the proposed order.

20 THE COURT: Mr. Baena, did you have something you
21 wanted to say?

22 MR. BAENA: May it please the Court, I just want to
23 make sure that the Court got the answers to all the questions
24 that the Court had. I believe that one of the questions you
25 asked was whether the loss of exclusivity by the debtor would

1 impact the settlement agreement, and I think the answer is,
2 not really. This settlement agreement provides a contour for
3 a reorganization of the debtors by any party in interest
4 offering up such plan of reorganization, so long as everybody
5 abides by the terms of the settlement agreement. And I can't
6 imagine a constituency in this case that would wish to
7 somehow fail to follow the road map of this settlement
8 agreement and thereby augment this estate's assets for
9 reorganization by, as Mr. Wasserstein said, one billion
10 dollars or more. It's ironic, Judge, that it was on June
11 14th, that Mr. Lockwood and I -- June 14, 2001, that Mr.
12 Lockwood and I went to Judge Wolin and asked for permission
13 to prosecute this list. It was November 27, 2003 when we
14 came to a settlement with Sealed Air and Fresenius about that
15 litigation, and here we are, not quite but almost two years
16 later, trying to consummate it. We urge that the Court
17 approve the settlement here and now so that there's no
18 misgivings or any question about the fact that this is
19 available as a centerpiece of a plan of reorganization.

20 THE COURT: Okay. Mona, can you call Rachel and
21 get them to turn some air on in here. It is really awful.
22 All right, anyone else? All right, let me take a look at
23 this order, please. Okay, how long is the Bankruptcy Court
24 supposed to have jurisdiction to make the determination as to
25 whether or not the applicability of paragraph (4) that there

1 has been some change in the circumstances after the date that
2 the settlement's approved will take place?

3 MR. WASSERSTEIN: I'm not sure that the parties
4 considered that, Your Honor, but I would assume that it would
5 be as long as there's an issue relating to tax returns being
6 submitted. Does that sound right? Mr. Chehi points out,
7 Your Honor, that paragraph (11) provides for continued
8 jurisdiction of the Court even after the closing of the
9 Chapter 11 cases.

10 THE COURT: Well, that's what the old order said
11 too.

12 MR. WASSERSTEIN: Yes. It said it in paragraph
13 (10) however.

14 THE COURT: Okay. Congratulations. The estate's
15 \$1.2 billion richer.

16 MR. WASSERSTEIN: Thank you, Your Honor.

17 MR. BAENA: Thank you, Judge.

18 THE COURT: Now, is there anything left in these
19 two adversaries? Can they be closed? Because if so, I want
20 to put that in this order too. One is still closed, has
21 never been reopened, I think, even though we're still getting
22 things filed at it.

23 MR. BAENA: Judge, my confusion is, where the
24 adversaries are right now, actually.

25 THE COURT: Well, I hope they're here because if

1 they're not this order's not worth much.

2 MR. BAENA: Because, you know, we were prosecuting
3 this as additional.

4 THE COURT: No, I believe that they're back here
5 because --

6 MR. BAENA: And those files have been closed. I
7 thought we had --

8 THE COURT: No, the confusion is that one of the
9 adversaries has been closed, but you folks are still filing
10 things at it. The other adversary has not been closed, but
11 not much is being filed at it. This one has both adversary
12 dockets on it, docket numbers on it, one of which is closed
13 and has not been reopened including the fact that fee
14 petitions were filed at it. I raised this with debtors'
15 counsel a number of months ago asking them to get it reopened
16 if necessary. It's never been reopened. So right now, I
17 have a closed adversary that I'm entering an order at.

18 MR. HURFORD: Your Honor, if I may, Mark Hurford of
19 Campbell & Levine. The other issue that remains open, as
20 Your Honor may or may not be aware, is in relation to the
21 Cybergenics opinion, there were some motions filed to attempt
22 to deal with that situation. There were appeals taken to the
23 Third Circuit. Some of those appeal remain pending. Our
24 office, our Committee has been communicating, with the help
25 of the other parties, to update the Third Circuit on where

1 those are. So, that case will need to be closed out --

2 THE COURT: Which adversary?

3 MR. HURFORD: Well, we appealed from really both.
4 To my knowledge Judge Wolin consolidated both of the
5 adversaries to be dealt with together.

6 THE COURT: Well, I don't think there's an order
7 that substantively consolidates these. I know he was
8 tracking them together, but I'm not familiar with all of
9 Judge Wolin's orders, but I'm not aware of one that
10 consolidated the adversaries.

11 MR. HURFORD: Your Honor may be correct. There may
12 not be a written order to that effect, but they were all
13 dealt with in a consolidated basis, and my office will take
14 the lead in disposing of the appeal to the Third Circuit.
15 We've indicated to them that once this order was entered, we
16 would communicate with all the parties to dispose of those
17 appeals.

18 THE COURT: They're moot?

19 MR. HURFORD: Exactly.

20 THE COURT: All right, so you're going to be
21 dismissing the appeal. So that won't be a bar to closing the
22 adversaries.

23 MR. HURFORD: I'm just noting for the Court that
24 that needs to be done, that's all.

25 MR. CHEHI: Your Honor, Mark Chehi again. Just as

1 a point of information, it may be helpful. The adversary
2 proceeding in which the Sealed Air disputes were being
3 adjudicated and out of which this settlement agreement arises
4 was referred to this Court, Your Honor, for purposes of the
5 settlement motion only. That had been pending for some time,
6 so, assumably then the adversary proceedings that are at
7 issue are still pending before Judge Buckwalter in the
8 District Court, and probably the right thing to do here, as
9 just a suggestion, is to the extent that there's appellate
10 practice pending out of the Sealed Air matter and the other,
11 you know, again, dismissal of the appeals is appropriate, and
12 then just leave the adversary proceedings open as they might
13 be before Judge Buckwalter and just have this settlement
14 order entered there, and then the parties could move before
15 Judge Buckwalter to close the adversaries if they're still
16 before him.

17 THE COURT: Well, what's left in the adversary?

18 MR. BAENA: I don't know that that's exactly right,
19 with all due respect, because Judge Buckwalter referred the
20 settlement motion in all related pleadings, as I recall, to
21 this Court, and we never really understood what that meant.
22 We assumed it meant everything. Indeed, you dealt with the
23 fee aspects.

24 THE COURT: Yeah, I thought it meant everything
25 because I don't know what's not related to the settlement

1 motion.

2 MR. WASSERSTEIN: There is one thing that is
3 pending before Judge Buckwalter that is a conditional motion
4 that was made by Sealed Air in connection with revisiting
5 Judge Wolin's decision regarding the standards to be applied
6 to determine solvency back in July of 2002. That motion was
7 filed, admitted, and stated to be a motion that was a
8 conditional motion, a protective motion, in the event that
9 the settlement agreement and the terms of the settlement
10 agreement were not incorporated into a plan of reorganization
11 and that the Sealed Air settlement fell apart. That is still
12 something since there is not yet a plan of reorganization
13 that's been approved that is still something that has a
14 capability -- I'm not saying a likelihood but a capability of
15 rearing itself again. And so, therefore, that motion I would
16 not like to have -- I would like to keep that alive.

17 THE COURT: Why can't that simply be dismissed
18 without prejudice so that in the event that this does fall
19 apart, you can revisit it and reopen the adversary. I don't
20 see any reason to keep an adversary open when you've got a
21 settlement. I mean, you've either got a settlement or you
22 don't.

23 MR. WASSERSTEIN: Your Honor, I don't have a
24 problem if it were withdrawn without prejudice to renewal in
25 the event that the settlement does not go through. That

1 would not be an issue for us.

2 THE COURT: Okay, but one second. Okay, one of the
3 adversaries is closed. I don't know whether the District
4 Court Clerk closed it or the Bankruptcy Court Clerk closed
5 it, but one of the adversaries is closed. So, it doesn't
6 exist anywhere anymore, and that's why I'm still confused
7 about where these orders are to be docketed and whether both
8 adversaries are ready for final disposition.

9 MR. BAENA: Your Honor, the adversary that was
10 closed, we believe, is the Fresenius adversary, which was 02-
11 2211.

12 THE COURT: Okay.

13 MR. BAENA: The adversary that remains open is the
14 Sealed Air adversary, which is 02-2210. This motion,
15 obviously, relates directly to 02-2210.

16 MR. WASSERSTEIN: Correct.

17 MR. BAENA: And I would think that's where the
18 order ought to be filed when it's entered.

19 THE COURT: I'm sorry, the settlement or the Sealed
20 Air --

21 MR. BAENA: The settlement order in respect to
22 Sealed Air that was presented to you, which you approved,
23 that belongs to 2210.

24 THE COURT: Okay, but not to 2211?

25 MR. BAENA: No, no. 2211 was settled by a prior

1 settlement agreement that was approved by Judge Wolin, I
2 believe, a hundred or so years ago.

3 MR. WASSERSTEIN: Involving Fresenius but not
4 Sealed Air.

5 THE COURT: All right, one of the -- I think it was
6 this one, though, the Sealed Air adversary, Judge Wolin had
7 actually entered -- had actually signed an order that has
8 never been docketed that approved the settlement in
9 principal. I thought that actually applied to both. It was
10 apparently not docketed because there were documents filed
11 under seal so for some reason the order that approved the
12 settlement didn't get filed.

13 MR. WASSERSTEIN: Now, I understand the confusion.
14 That was signed on Thanksgiving Eve, 2002.

15 MR. BAENA: November 27, 2003.

16 MR. WASSERSTEIN: 2002.

17 MR. BAENA: 2003?

18 MR. WASSERSTEIN: 2002. That was when both -- when
19 there were term sheets that were submitted in connection with
20 both cases to Judge Wolin subject to execution of formal
21 settlement agreements.

22 THE COURT: Right, that's right.

23 MR. WASSERSTEIN: So, that did apply to both of
24 those cases. Subsequently, the Fresenius settlement
25 agreement was executed, presented to Judge Wolin, and

1 approved by him, but this one, involving Sealed Air was never
2 -- Well, it was presented to him, but it was never approved
3 because of all the problems that developed thereafter.

4 THE COURT: All right. Okay, so, this says at the
5 bottom of the caption that this document pertains to
6 Adversary 02-2210, and that is correct.

7 MR. BAENA: That is correct.

8 THE COURT: And that's where it should be docketed.
9 Okay, so, Fresenius was closed. Nothing's pending in it. So
10 now let me restate the question: Can this one be closed?

11 MR. WASSERSTEIN: It can be, Your Honor, so long as
12 it's understood that the motion that we have presently
13 pending before Judge Buckwalter can be renewed. It would be
14 withdrawn without prejudice to its renewal in the event that
15 ultimately the settlement agreement was not performed.

16 THE COURT: All right, I will either write that
17 into this order or you folks can submit a separate order that
18 closes the adversary, which may be more appropriate since you
19 want to get the appeals dismissed anyway.

20 MR. WASSERSTEIN: We will do it with a separate
21 order.

22 THE COURT: All right, but I want a deadline for
23 doing it so I can not have to track this anymore.

24 MR. CHEHI: What about July 8th, Your Honor, right
25 after the holiday.

1 THE COURT: That's fine.

2 MR. BAENA: This year?

3 MR. CHEHI: This year, 2005.

4 THE COURT: All right. A certification of counsel
5 with an order closing the 02-2210 adversary is to be
6 submitted -- Who's going to submit it?

7 MR. CHEHI: Sealed Air can submit it, Your Honor.

8 THE COURT: All right. So there are no further fee
9 apps, nothing, coming in either of these adversaries; is that
10 correct? This is it.

11 MR. BAENA: Judge, the order you've entered has a
12 retention of jurisdiction provision --

13 THE COURT: Yes, it does.

14 MR. BAENA: -- in respect to the settlement, and
15 we're content that that's sufficient for us to come back to
16 you if there's any problems between us in regard to the
17 consummation of the settlement. In regard to the pleadings,
18 the pleadings are concluded. There are no further pleadings
19 to be had.

20 THE COURT: All right, okay. You disagree?

21 MR. TACCONELLI: No, Your Honor. Theodore
22 Tacconelli, local counsel for the Property Damage Committee.
23 Your Honor, we were directed to file our fee applications in
24 this adversary proceeding. Our firm filed a quarterly fee
25 application in the 2210 adversary proceeding. What we could

1 do is we could withdraw that and file it in the main case.
2 It's a very small fee application. I certainly don't want
3 that to hold this up.

4 THE COURT: When is it set for hearing?

5 MR. TACCONELLI: That would be the next round of
6 quarterly fee applications in this case, whatever the next
7 date would be.

8 THE COURT: All right, if you don't mind, Mr.
9 Tacconelli, I think that would be helpful.

10 MR. TACCONELLI: That will be fine, Your Honor.

11 THE COURT: All right.

12 MR. TACCONELLI: We will withdraw it and file in
13 the main case.

14 THE COURT: Thank you.

15 MR. TACCONELLI: Thank you.

16 THE COURT: No one has an opposition to that;
17 correct? Okay, thank you.

18 MR. TACCONELLI: Thank you, Your Honor.

19 THE COURT: Thank you. Ms. Baer?

20 MS. BAER: Your Honor, agenda item number, I think
21 it's 16, yes, is the motion of The Scotts Company. That was
22 mistakenly put on the agenda. That matter was actually
23 resolved a couple of months ago, and you ordered that it be
24 placed back on the agenda for next February. And with that,
25 Your Honor, we are ready to go back to agenda item number 8,

1 which is exclusivity, and Mr. Bernick will address that.

2 THE COURT: Anyone need a break? No? Let's just
3 keep going then.

4 MR. BERNICK: Your Honor, I want to take us back
5 for just a moment to the end of the hearing that took place
6 on the 21st of January of this year. Your Honor will recall
7 at that time that the debtors had just filed the proposed
8 plan of reorganization which was obviously a significant
9 development in the case, and that plan garnered the support
10 both from equity holders and also from the unsecured
11 creditors. It also attracted objections by other
12 constituencies, and in particular, the other constituencies
13 lodged objections to the ultimate confirm-ability of the
14 plan. We had an extensive argument on the 21st of January, a
15 very detailed argument. And at the conclusion of the
16 argument, Your Honor decided to defer those issues, those
17 confirmation issues until after we had gone through an
18 estimation process, and that's where we were. What was
19 interesting was that there was only one objection to the
20 continuation or extension of exclusivity at that time, and it
21 was kind of, what I'll call, a MEAP (phonetical) objection.
22 There's one objection by the Future Claimants Representative,
23 Mr. Austern, and after all of the debates that took place
24 during that hearing, we took up the issue of exclusivity, and
25 Mr. Frankel very graciously said, Well, we do have an

1 objection but we're prepared to withdraw that objection, and
2 exclusivity was extended, therefore, until this month. Now,
3 when it comes to this extension of exclusivity, we are
4 walking down the road, indeed trying to move more quickly
5 down the road, following through on exactly the plan and the
6 path that was set out in January, but now we have three
7 objections that have been lodged, the Futures Representative,
8 the Personal Injury Committee, and also the Property Damage
9 Committee. And they're lodged with fervor in, you know,
10 tension, and the real question is, well, what is it that's
11 happened since January that has so dramatically altered the
12 path of this case that when there was essentially no
13 objection in January, there's now all of a sudden all of
14 these objections to exclusivity being extended, and I would
15 venture to say that there are three ways of looking at this:
16 Two are improper, one is proper, and the answer under the
17 proper consideration is there clearly ought to be an
18 extension of exclusivity. The first improper suggestion
19 that's made in the papers in support of the objection to
20 exclusivity, is that we're all dealing with a plan that is an
21 un-confirmable plan. That is nothing more than an effort to
22 reargue the very issue that the Court addressed in January
23 and said was going to be deferred. We're not going to gain
24 here by continually revisiting the issue, the same identical
25 issue, of whether the plan is confirmable or not. We

1 obviously believe that it is. We have support in that in the
2 Equity Committee and the Unsecured Creditors Committee. They
3 agree that it is. There's disagreement, and Your Honor
4 decided in January that we were going to defer that issue.
5 Why are we continuing to talk about it? It's a waste of
6 time. The second consideration, that I think drives these
7 papers and it's very obvious, is that as we now have gone
8 down the road of the objection process that we believe is
9 critical to estimation, that is the process of obtaining
10 answers to these claim forms, making objections and the like,
11 the pressure is on. It's on the property damage claimants
12 because we now have their claim forms, and we are now lodging
13 the objections. It is on the Personal Injury Committee
14 because we now have submitted a proposed claim form that we
15 believe is going to be very effective in connection with the
16 estimation process. All these things clearly were
17 contemplated in January. We're now moving down that road,
18 and basically, what we're now seeing is the revival of issues
19 about whether there really ought to be this kind of objection
20 process. How revived? Well, if they terminate exclusivity,
21 then presumably they're going to be arguing for a different
22 kind of plan that doesn't turn on any of those things. Their
23 kind of estimation, which doesn't really consider the merits
24 of any of the claims, is simply an extrapolation from
25 settlements. You know all these arguments. We're going to

1 go down the road to a one-way street estimation. So the sub-
2 text of the request that exclusivity not be extended, the
3 sub-text is quite clear, which is, Your Honor, don't take the
4 time to do an estimation that is an actual litigated
5 estimation, terminate exclusivity so that we can come up with
6 a plan that won't require any of that effort, and we'll be
7 able to cram it down. Now, obviously that is a false
8 promise. If exclusivity were terminated and other additional
9 plans were submitted, there's no way that the interest of the
10 equity holders or the interest of the unsecured creditors can
11 simply be blinked away. We're going to face exactly the same
12 issues, but now in the context of a much messier situation,
13 which is competing plans. Which then brings us to what the
14 real issue is, and the third issue, and that is very simple.
15 Since January, when there was the MEAP objection then
16 withdrawn and there were no objections, is there some
17 fundamentally different vision of how this case can be
18 resolved then we were talking about in January or that we've
19 talked about for the last three years? Is there something
20 new that all of a sudden is now being articulated? And the
21 answer to that is absolutely not. There's no new vision for
22 the future, no silver bullet, no magical solution that
23 somebody has conceived of in the six months that now have
24 passed that all of a sudden is going to bring this case to a
25 close without addressing the hard issues that have posed a

1 quandary in all respects, litigation respects, settlement
2 respects, and the like, there is no new path, and the path
3 that we're on, we believe, Your Honor, is the right path.
4 And let me be very specific on what we propose going forward.
5 We had back at the beginning and it is ironic in hearing the
6 complaints about the time that this case has taken when you
7 think about where this case was and when it was filed in
8 2001. In 2001, the very first day of the case, we laid out a
9 road map that identified each and every one of the issues
10 that had to be addressed, and they could be addressed by
11 settlement or it could be addressed by litigation. And they
12 haven't changed. We have ZAI. We have the traditional
13 property damage claims. We have personal injury, and we have
14 fraudulent conveyance. We talked about these on 4/01.
15 Fraudulent conveyance actually was raised because of
16 continuing the effort on part of certain claimants, the AI
17 claimants, to continue litigation outside the context of the
18 bankruptcy. They were all raised, and I remember still, I
19 think it was November 22nd of 2001, we actually had case
20 management orders that had been submitted. We had briefs
21 that contested those orders and made other kinds of
22 proposals. Everything was before Judge Farnan. Everything
23 was ripe. Case management, let's go. And then we learned,
24 literally, as we came into court for a hearing on the case
25 management orders, we learned that the case was going to be

1 reassigned. And as a result, Judge Wolin took over, and
2 Judge Wolin decided he had a priority scheme. He wanted the
3 fraudulent conveyance to be number one. He wanted PI to be
4 held, and PD and ZAI, he said, Well, those can go forward but
5 before Your Honor. And we now know that as a result of that,
6 during the period of time that then followed, the fraudulent
7 conveyance claim that was litigated in '01 has now been
8 settled. The ZAI claim was litigated, and it's now under
9 submission. The PD claims, we got the forms, which were
10 contested and then approved by Your Honor and then the appeal
11 was taken, actually by the Property Damage Committee, and
12 those forms were in place, and they've now been filled out
13 and we're poised to litigate that. That was able to go
14 forward, Your Honor was able to pursue both of the dimensions
15 of the litigation that had been placed before you, and the
16 personal injury folks remained on hold. We didn't -- I mean,
17 Judge Wolin was very explicit. He put it very far at the end
18 of the game, and it's only recently that we've now got a
19 proposed form on personal injury. This now, the settlement
20 of fraudulent conveyance has been approved. This is
21 submitted for a ruling, that is ZAI and with respect to PD
22 we're now in the process of filing objections. So, while the
23 timing is not ideal from anybody's point of view, to say
24 nothing of the debtor, the debtor's been here from day one,
25 he could not have been more diligent. We pressed at every

1 single opportunity. So, where does this leave us? First I
2 should say, we should make mention of the legislation. The
3 legislation is kind of the 600 pound gorilla, actually I
4 think that -- originally that role was accorded to the ZAI
5 claimants by Brother Lockwood. So, it's the two ton elephant
6 in the room, and it's a factor that's out there, and it's on
7 people's minds, but I think there's probably a lesson from
8 the CE case, the new CE plan, the modified plan was just
9 submitted at the end of last week. Combustion Engineering
10 maybe had no choice but to go forward with their efforts to
11 reorganize because they couldn't wait for legislation, and
12 now finally, God bless, it looks like that actually is going
13 to get resolved. I don't know where the legislation is going
14 to go. I don't think anybody knows where the legislation's
15 going to go, but one thing's for sure, which is that we're
16 not going to make progress in this case simply waiting for
17 the crystal ball on legislation to become clear. We had to
18 press this case forward. So there is no silver bullet that
19 we can count on in the context of this Court. Second path is
20 settlement, and there's a reference in the papers filed by
21 the property damage claimants that they're unaware of
22 settlement discussions, which is kind of a stunning
23 statement. The company throughout this entire period of time
24 has had numerous contacts with all constituencies, including
25 members of the Property Damage Committee to deal with the

1 prospect of finally trying to settle this case. There have
2 been all kinds of discussions with all kinds of lawyers, all
3 kinds of representatives. We have not been idle in that
4 process. What has emerged? Well, gee, it's a shocker. It's
5 not just the debtor who disagrees with the value of the
6 claims that have been lodged. We're not the only ones that
7 have an issue. The property damage claimants disagree with
8 the personal injury claimants and what the personal injury
9 claims are worth. The personal injury claimants disagree
10 with the property damage claimants. This is not the first
11 case. They've been fighting with each other since the
12 Celotex case, and they continue to fight with each other in
13 the Celotex case tooth and nail. They're fighting in other
14 cases. So, the tort claimants, bodily injury and property,
15 they're at each other's throats. They don't agree on what
16 the settlement value should be. What about the ZAI claimants
17 versus the traditional property claimants? They don't agree
18 either. What about the relationship between all that and
19 equity, or all that and the unsecured debt? No one agrees.
20 No one can even figure out what the claims are worth. And
21 traditionally that's what the court system is all about. If
22 you can't agree on what the claims are worth, you litigate,
23 and the only way that you make progress in settlement is to
24 litigate because it creates the pressure for settlement. So,
25 the whole idea that somehow the debtor has been an obstacle

1 in this process is laughable, and then the Future Claims
2 Representative was appointed, and David Austern is one very
3 talented, resourceful, and capable Future Claims
4 Representative, and a good force for mediation and
5 settlement, and that held out some promise. They haven't
6 come up with a concept either that everybody agrees to. So,
7 this is not a debtor problem. This is a problem that is
8 endemic to the subject matter of the case. Now, the only way
9 the problem can be resolved, is to make further progress on
10 the litigation front, which then brings me to where we are,
11 and where I think that we should go. We believe that Your
12 Honor should continue to press forward. When it comes to
13 ZAI, I know we discussed this last time, but we believe it
14 would be critical for Your Honor to devote the time and
15 resources that are necessary to decide that issue. It's just
16 --

17 THE COURT: I am doing that.

18 MR. BERNICK: Good, great, terrific. With respect
19 to personal injury, on personal injury we now have the forms
20 that have been developed, and there's been a very
21 entertaining if not productive dialogue between the debtor
22 and Mr. Lockwood and the others on the Personal Injury
23 Committee with regard to that form. We spent a lot of time
24 on it. They spent a lot of time on it, and it's now going to
25 be before Your Honor for a determination, just like we did

1 property damage personal injury, that group can do personal
2 injury. Personal injury inevitably will take more time as a
3 track because the form has to be filled out and there are
4 some tough issues. So, in a sense, that's probably the
5 slowest track. Fraudulent conveyance we don't have to worry
6 about any more, which leaves us, and I think I'm going to
7 spend a couple of minutes with respect to the property damage
8 claims. All right, Jen, if you could hand up to the Court
9 and two others these -- Yes, just all of them. I just want
10 to review very quickly what we think is going to happen with
11 the property damage which is actually, I think, going to
12 occupy the attention of the parties here in the short term.
13 If you could just --

14 MR. BAENA: Judge, while they're looking for
15 charts, can I just have clarification. Are we arguing
16 exclusivity now or are we arguing the status conference about
17 PD claims or are we just going off on a tangent to obfuscate
18 the issue before Court?

19 MR. BERNICK: What we're doing is we're handing up
20 the charts that will then be used for the exclusivity
21 argument. If you want to look at them, that's probably the
22 best way of expediting them, but we'll get to all those
23 issues in due course. They have seen fit to object to the
24 extension of exclusivity in the very midst of the process
25 that constitutes the lifeblood of this case. If they don't

1 want to listen to the reasons why we believe that exclusivity
2 should be extended, that's fine, but they're the ones that
3 have made the objection. Door is open, we're walking through
4 the door. What is going on with the traditional property
5 damage claims? Well, as you can see from the first chart,
6 Mr. Speights, from Speights and Runyan, accounts for 73
7 percent of all the asbestos property damage claims, 73
8 percent. Mr. Dyes (phonetical) who is also a very -- been
9 involved very deeply in this process for many years, has come
10 in with what is obviously a much more limited universe of
11 claims at about 4 percent. It's 150. Now, we have all the
12 information from the claim forms, Your Honor, and we're now
13 putting it on a -- it's basically an analytical structure, a
14 data base that we're using so that we can lodge all
15 objections, based upon the face of the claim form and on the
16 basis of the documentation that's attached, we believe by the
17 middle of September if not sooner. So, while we're peeling
18 off the issue of the authority to file claims, our goal is to
19 be completely done with that by the middle of September so we
20 can then litigate the success of issues going forward and
21 find out how much this traditional property damage claim is
22 worth. Remember, at the time that this case was filed, there
23 were only seven property damage cases left in the entire
24 United States. We now see over 4,000. That does tend to
25 raise a question about what's going on. We know what's going

1 on now. Mr. Speights has been called on this now in several
2 different cases, Federal Mogul; In Re: Owens Corning; In Re:
3 Celotex; In Re: U.S. Mineral Product Company; and also in
4 Armstrong --

5 MR. BAENA: I'm going to object, Your Honor. I am
6 going to object. This is outrageous. Mr. Speights isn't
7 here. There's no motion that regards Mr. Speights' claims.
8 There's nothing on this agenda today about the liquidation or
9 the discussion about property damage claims except the status
10 conference in regard to a case management order. All we're
11 here about is whether or not this debtor should have six more
12 months of exclusivity. That's what we're here about.

13 MR. BERNICK: This is a speaking objection, Your
14 Honor.

15 MR. BAENA: No, I --

16 MR. BERNICK: Mr. Bernick --

17 THE COURT: Gentlemen, both of you stop. Mr.
18 Baena, your objection's overruled for this reason: The
19 debtor is trying to tell me what it's going to do to keep the
20 case moving and Mr. Speights' objections on the property
21 damage side, if they have to be litigated, are going to take
22 up a lot of the resources. To the extent that that's all the
23 debtor's trying to tell me, I got the point, Mr. Bernick, you
24 can move onto something else.

25 MR. BERNICK: That's fine. We have a process in

1 motion to deal with -- Let me just give you a global number.
2 I think, frankly, it's virtually all of his claims have a
3 fundamental issue which is about whether they've been
4 authorized to be filed to begin with by an actual client, and
5 that's one issue that we're going to frame.

6 THE COURT: It doesn't matter. I got the point.
7 You're going to take on the property damage issues based on
8 the forms that have been filed --

9 MR. BERNICK: Yes.

10 THE COURT: -- fine. That's what you ought to do.
11 I'm happy to see that it's coming. September's a good time
12 frame, okay.

13 MR. BERNICK: Okay. So we then have the remainder
14 which would be -- We believe that the property damage claims,
15 we will be able to file our objections in September, and we
16 then have submitted a case management order, which is the
17 second real item, I think, that we're going to take up that
18 deals with that. Let me touch on that very briefly without
19 getting into the details. Your Honor directed us in January
20 to develop such a case management order, and I think that the
21 process was a good and cooperative one in terms of the
22 overall flow of events. An issue has now been raised, which
23 I know we'll talk about when we get to the order of whether
24 the -- whether counsel for the Property Damage Committee is
25 actually prepared to proceed on the basis of the schedule

1 that we had originally contemplated. So the reason that
2 we're filing what is not an agreed case management order, the
3 reason is that we have a different view on how promptly that
4 should proceed, and the reason that's relevant to exclusivity
5 is we are proposing that certain of the issues relating to
6 the property damage claims, that is authorization be taken up
7 in September, others be taken up beginning in October, and
8 those are two issues: constructive notice, which can be
9 litigated on a generic basis, and the Daubert issue, which is
10 a question of data. That was the same issue that we
11 litigated before Judge Newsome in the Armstrong case and led
12 him to strike the basis for most of the property damage
13 claims, and of course, those claims later were settled by
14 Armstrong. We anticipate exactly the same kind of processes,
15 it's a cookie cutter from Armstrong. It's not specific to
16 any individual claim. We then have the other issues, which
17 we believe can be litigated on a generic basis, and we would
18 propose that they are kind of the last way, but all ways
19 would be completed by the spring to early summer of next
20 year. We would have basically three hearings over time, the
21 last one being in June, and that would bring this track to a
22 close. Of course we hope that at any point during that
23 process that we can reach agreement, but really ZAI and
24 property, now that fraudulent conveyance is out of the
25 picture, it is our assessment that they are today the

1 principal reasons why this case cannot be settled. That's
2 not to say that we're not going to have a lot of issues with
3 the personal injury folks, but we believe that there's so
4 much swing here and the argued for value of these property
5 claims versus what we believe the reality is, that that is
6 where the principal obstacle to settle them currently lies.
7 Now, there have been objections that have been lodged. And I
8 just want to make a couple of comments on the objections, and
9 then I note that counsel will speak as vigorously in support
10 of those objections as they have done in their pleadings.
11 First of all, the Future Claims Representative, for the life
12 of me, I can't understand what has changed from the
13 perspective of the Future Claims Representative since they
14 raised their hand alone in January as being the sole
15 objectors and then said, Well, that's okay. We understand
16 where Your Honor's headed. We withdraw our objection. Why
17 are they back turning over the same soil, making the same
18 arguments? They don't have any magical settlement wand
19 either. The personal injury folks are objecting. It's
20 obvious why they're objecting. They know that if this
21 process of claim form development and completion goes
22 forward, that they will face a real contest on estimation as
23 opposed to their usual plug the settlement numbers in and see
24 what comes out at the end kind of approach, which has never
25 been approved when objected to. The property damage folks,

1 again, it's very obvious. They want to avoid the Speights &
2 Runyan issues. They want to avoid the objections and they
3 want more time. What is the vision that the Property Damage
4 Committee possibly can have? They have none, and the reason
5 they have none is very simple. This Committee now is
6 hopelessly conflicted. The PI, the traditional property
7 damage claims are competing for a piece of the same pie as
8 the ZAI claims. There are different traditional property
9 damage claimants with radically different kinds of claims
10 that they've submitted to Mr. Speights and his 2,000 claims
11 are completely different. Some of them we don't even know
12 who the client is, it's just a building. He puts a building
13 down on the claim form and says, That's my client. And some
14 of these people are now calling us saying, This guy doesn't
15 represent us. So they're conflicted as among the traditional
16 property damage claimants, and then finally the whole
17 Committee has obviously a very different view of the world
18 from PI and the unsecureds. Mr. Bennett complains that there
19 hasn't been a consensual resolution. The heart of that
20 complaint ought to be directed at his own committee which
21 can't agree on the approach that they want to take. And the
22 only answer to that is we're not asking to disband that
23 committee, the only answer is to remove the conflict by
24 resolving the issues that drive it. So, we would think it's
25 very important to keep this case on track. Grace is very

1 dedicated to the proposition that being timely before the
2 Court. I can tell the Court I apologize for having not
3 having been present at some of the hearings in the last nine
4 months. I was on trial. God bless, I'm done with that
5 trial, and I'm totally focused on this case, and we would ask
6 for six months' extension.

7 THE COURT: Mr. Baena? Oh, I'm sorry.

8 MR. PASQUALE: Ten seconds, Your Honor, I promise.
9 Ken Pasquale, for Stroock for the Unsecured Creditors
10 Committee. Your Honor, just for the record, we did not file
11 any papers frankly because we thought it apparent that in our
12 position as co-proponents of this plan, we do in fact support
13 the debtor's request for exclusivity, and we do so for all
14 the reasons that the debtor's put before you, and I just
15 wanted to stand and make that clear.

16 THE COURT: All right, thank you.

17 MR. PASQUALE: Thank you.

18 MR. BAENA: May it please the Court. Scott Baena
19 on behalf of the Property Damage Committee. Your Honor, this
20 is the eighth motion for the extension of exclusivity, and
21 indeed, the motion itself is nothing more than another
22 iteration of the same old motion that's been made seven
23 times. In fact, if you read that motion, it is almost devoid
24 of any grounds for granting the motion. The only indication
25 of cause that the motion sets forth for the extension of

1 exclusivity at this late date, is that the debtor needs the
2 time to, quote, "continue to make progress in their
3 development of a confirmable Chapter 11 plan." Likewise, at
4 paragraph (13) of the motion, the debtor states that the
5 termination of exclusivity would undermine the debtor's
6 opportunity to negotiate, file, and confirm a consensual plan
7 of reorganization. Now, I don't know what that means other
8 than what it appears to say, and that is, that the debtor
9 recognizes that it has a problem. The problem being the plan
10 which is on the table. We've articulated that that plan was
11 dead on arrival. We think to some extent the Court shared
12 our misgivings about the confirm-ability of that plan back in
13 January. And deferred may be a charitable way of just saying
14 putting off to another day dealing with its infirmities. Our
15 concern, Judge, is that what the debtor tries to do is
16 connect the estimation process with the extension of
17 exclusivity in respect of the plan which is on the table.
18 And we don't see that connection. We think that back in
19 January when the Court said we're going to embark upon an
20 estimation process, it wasn't in respect of the debtor's plan
21 per se as opposed to in respect to any plan. And it didn't
22 say -- And the Court did not say that the debtor is going to
23 have exclusivity for the duration of the estimation processes
24 that it undertakes in respect of both PD and PI, and it
25 didn't say that nobody could ever complain about the

1 exclusivity that the debtor is enjoying in the meanwhile in
2 respect of this particular plan that's it's filed. The
3 Court, indeed, left the door wide open for exactly what's
4 happening today. The debtor recognizes by its motion that it
5 should be doing more to gain consensus for a plan, not the
6 plan that's on the table. And I must tell you, Judge, I
7 heard Mr. Bernick describe a process that he says is going on
8 in criticism of statements made by Property Damage in its
9 objection. I'm unaware of the process. I'm just unaware of
10 any discussions, any substantive discussions that have taken
11 place in earnest since last year. It's June, Judge. We have
12 just enjoyed the fourth anniversary of this case. The
13 estimation process will go forward. We do not resist it
14 going forward. We'll talk about the CMO later. We'll talk
15 about the fact that the CMO they want to present to you
16 today, I got it 5:30 on Saturday when I was out of the
17 country. We'll talk about that. But we have not resisted
18 after our initial objections to the process, we have not
19 resisted, indeed, we've done everything we can to make the
20 estimation process in respect to property damage at least a
21 viable process. But the fact that it goes on is only by
22 recognition of everybody in the case that it has to happen in
23 respect of any plan that comes before the Court. It doesn't
24 entitle this debtor to hold us hostage while it undertakes a
25 program for estimation that could be two or three years. We

1 can't leave ourselves with their plan as the only option, and
2 we can't give them the prerogative by keeping their plan on
3 the table, of keeping us out of the discussion about a
4 consensual plan that we can put on the table. And that's
5 what they're doing. And, Judge, we've complained as well
6 that you've got to take into account in some context or
7 another and we think it's in this context. But this isn't
8 the greatest debtor in the world. Despite all the bravado
9 and all the musings about the things that they've done, this
10 is a debtor that's been indicted during the course of a
11 Chapter 11 proceeding. This is a debtor that three officers
12 of have been indicted during the course of a Chapter 11
13 proceeding. This is a debtor that's spending millions of
14 dollars every month to defend those officers and itself in
15 criminal proceeding.

16 THE COURT: Those actions, as I understand it,
17 happened before the case was filed, as I understand, with the
18 ZAI -- or I'm sorry, the Libbey issues; is that the basically
19 the --

20 MR. BAENA: Judge, the criminal conduct that
21 they're charged for occurred over an extended period of time
22 including before the occurrence of bankruptcy. But the
23 indictment occurred, forgive me for putting it so bluntly, on
24 your watch.

25 THE COURT: I understand that. Nonetheless, to the

1 extent that that is somehow an accusation that I had
2 something to do with the criminal indictment, I hope you'll
3 withdraw that statement.

4 MR. BAENA: But there was criminal conduct that
5 occurred post-petition as well, Judge.

6 MR. BERNICK: Mr. Baena ought to be very careful in
7 making representations to the Court about the connection of
8 that kind of proceeding and clients that he represents are
9 part of his Committee in Libbey, if he opens that door, he
10 ought to be fully cognizant of what the consequence might be.
11 He's now saying that that criminal proceeding has welded up
12 in this Court, and that's a very, very interesting concept
13 for his client to be pursuing here.

14 THE COURT: Gentlemen, we're going to take a ten-
15 minute recess. Mr. Baena, cool off.

16 (Whereupon at 1:33 p.m. a recess was taken in the
17 hearing in this matter.)

18 (Whereupon at 1:44 p.m. the hearing in this matter
19 reconvened and the following proceedings were had:)

20 THE CLERK: All rise.

21 THE COURT: Please be seated. Mr. Baena.

22 MR. BAENA: I apologize to the Court if I made my
23 point too strenuously, Judge.

24 THE COURT: No, Mr. Baena, if you're accusing me of
25 something improper, I want to see it in writing, and I will

1 stop these hearings right now.

2 MR. BAENA: I wasn't accusing the Court of
3 anything, Judge, other than the fact that we have a debtor
4 that has misbehaved.

5 THE COURT: We do. That's apparent, at least from
6 the prosecution's point of view with criminal indictments,
7 but Mr. Baena, you've been involved in this case. The other
8 committees have been involved in this case, and quite
9 frankly, the only information I get is by way of pleadings
10 filed from parties, and to the best of my knowledge, I wasn't
11 given any information early on in this case that there were
12 indictments likely of officers, directors, or anyone else in
13 the case, and I resent the accusation, and I don't use that
14 word lightly because there are very few things in my life
15 that make me resent things, and I do resent that remark. So,
16 if you think I'm doing something improper, I want to hear it
17 right now. I want it filed in writing, and I will stop these
18 proceedings until it is adjudicated. This is your chance.

19 MR. BAENA: Judge, again, I never suggested except
20 perhaps by the use of poor choice of words that the Court did
21 anything untoward. Nothing was intended to make that
22 accusation.

23 THE COURT: All right, then let's get on with the
24 argument.

25 MR. BAENA: Judge, I'd like to make two last points

1 and leave it to our papers, which I think are extensive and
2 set forth adequate reasons why this motion ought to be
3 denied. The first point I'd like to make is the observation
4 that Mr. Pasquale brings to mind when he speaks on behalf of
5 a co-proponent of the pending plan, and that is the fact that
6 the Equity Committee and the Trade Committee are co-
7 proponents of the plan that is on the table. And it just
8 strikes us as odd and inexplicable that the only way to be a
9 player four years in this game about the outcome of this case
10 is by agreeing with the debtor to a plan that we can't agree
11 to. And because we object to it, we're left at the side
12 lines like critics as opposed to proponents. The unsecureds,
13 equity, and the debtor have had the opportunity to put
14 forward a plan. Four years later, we have not, the asbestos
15 constituencies have not. We're sidelined, and we believe
16 that that's inappropriate. The second point I'd like to
17 make, we do allude to in our papers, and I think it's more
18 than anecdotal. It's very reflective of a point, and that is
19 the fact that under the Reform Act that was recently passed
20 by Congress, we wouldn't be debating four years into a case
21 whether somebody should have that exclusivity.

22 THE COURT: That's right, we wouldn't have this
23 case at all. No one in their right mind will file a
24 bankruptcy case like this under the Reform Act.

25 MR. BAENA: And there has to be a reason why

1 Congress said, Eighteen months is enough, and other people
2 ought to have a chance. And four years later, whatever
3 reason there was from eighteen months to four years, just as
4 Mr. Bernick asks, What's changed? The answer to the question
5 is, Nothing has changed, and that's the problem. Nothing has
6 changed. They're still pursuing a plan. By Mr. Bernick's
7 argument, he suggests that there's more life to that plan
8 which is on the table, then we believe there is, and you've
9 heard all about that. And yet, he believes that the
10 estimation proceeding is the preliminary event for that ill-
11 founded plan. We say, That's where he's wrong. It's a
12 preliminary event for any plan, and we shouldn't get through
13 that event, which could take, as I said before based on their
14 proposed case management orders, more than a year. In the
15 case of PI, at least two years. We shouldn't get through two
16 years of this process and say, Okay, now we've got six months
17 to go through their plan.

18 THE COURT: Well, okay, this is somewhat getting
19 into the case management side of things, but to the extent
20 that it's relevant, let's talk about it for a minute. How
21 soon do you want to try the cases?

22 MR. BAENA: That's not -- Judge, in all due
23 respect, that's not the point. I mean we've got limitations.
24 I've recognized those limitations. I agree with those
25 limitations. The question is what are we going to do at the

1 end of that event, and the way they see it, Judge --

2 THE COURT: At the end of that event, I think, the
3 following: If the estimation turns out to be more than the
4 \$1.7 billion that the debtor says has to be the minimal
5 number, that plan is not confirmable. So either the debtor
6 has to modify it or exclusivity should be terminated and
7 everybody will have a chance to come up with a plan with the
8 number that's been determined to exist by the Court.

9 MR. BAENA: So, Judge, by that observation, we're
10 not talking about a six month continuance here of
11 exclusivity. You're talking about two years or however long
12 that process takes.

13 THE COURT: So, if you want the process expedited,
14 we can expedite the process. If that's the issue, if the
15 timing of getting the claims estimated is the issue, then do
16 the discovery quicker and let's get to trial.

17 MR. BAENA: You see, Judge, this is where I think
18 it's unfair, the process is unfair. If the tradeoff for
19 being able to file your own plan is that you get less
20 procedurally in the estimation process in terms of time and
21 preparation, that's not fair.

22 THE COURT: No, actually, Mr. Baena, we wouldn't be
23 going forward to confirmation on any plan until the
24 estimation's done. So if I --

25 MR. BAENA: That's correct.

1 THE COURT: That's right. So if I terminate
2 exclusivity now, all that's going to do is provide, you know,
3 take a guess, one other plan, five other plans, none of which
4 I'm going to let go forward any way until the estimation's
5 over. So why don't we get through the estimation process.

6 MR. BAENA: Because the fact of those plans, Judge,
7 creates the playing field for a negotiation over a consensual
8 plan.

9 THE COURT: Oh, but, look, the playing field is
10 there. I mean, I'm a little bit at a loss to understand why
11 there can't be negotiations with or without any plan on the
12 table, but you've heard what the debtor thinks is the
13 debtor's best effort. Frankly, knowing the way negotiations
14 go in bankruptcy, I'm willing to believe that's there's
15 probably a little wiggle room on behalf of the debtor just
16 like there is on behalf of the Future Rep. and the Committee,
17 because there's always wiggle room or you can't have an
18 negotiation. So, folks, why you're not talking to each other
19 is beyond me, but this is what I'm going to do, whether
20 exclusivity is terminated or not, I am ordering all of you to
21 have a face-to-face meeting next week. I don't care whether
22 it's vacation schedules, period, that interfere, I want a
23 face-to-face meeting in which you will see whether or not you
24 can come to any essential agreement about any valuation issue
25 that's in dispute, if there is one, about any estimation

1 issue that's in dispute, both property damage and personally
2 injury-wise. Now, this can be structured. In fact, it
3 probably should be, so that there is a meeting first with
4 people interested in the property damage side and secondly
5 with people interested in the personal injury side, but
6 before there is any final agreement, you're all going to have
7 to get together. You want an opportunity to see if you can
8 do a consensual plan, this is it for everybody. For
9 everyone. So, if the numbers work out, in a way that you can
10 all agree, then there will be a consensual plan. If you
11 can't agree, then we have to go through the estimation
12 process, and until that estimation process is fixed, no
13 plan's going to be confirmed. So, whether there's
14 exclusivity or not right now, there won't be any movement
15 toward getting a plan out the door unless you have an
16 agreement or we get the estimation process done, otherwise,
17 there can't be a plan. So, I think, Mr. Baena, you hit the
18 nail on the head when you say, It's too long. I want it
19 shorter, a shorter time frame. We need to get the hearings
20 done sooner, and that includes me with the ZAI motion under
21 consideration, I understand that, but all of it needs to be
22 bumped up.

23 MR. BAENA: I have no further comments, Judge.
24 Thank you.

25 MR. FRANKEL: Good afternoon, Your Honor. Roger

1 Frankel for Mr. Austern. I'm not sure if Your Honor has
2 already decided this motion or not but --

3 THE COURT: No, I haven't.

4 MR. FRANKEL: -- I'll speak to it. First of all, I
5 didn't realize our withdrawing our objection last time would
6 be used against us this time. I think that what we wanted to
7 see was the progress that would be made over six months, and
8 we can envision a series of six month periods where very
9 little is done. What I want to discuss is the plan that was
10 filed by the debtor. It's very favorable to the commercial
11 creditors, very favorable to equity, and it's very hostile to
12 the asbestos claimants.

13 MR. BERNICK: Your Honor, I'm going to object,
14 because again, it's exactly -- Indeed it goes beyond the
15 confirmation issues that Your Honor determined in January
16 were premature.

17 THE COURT: Folks, can we get through the argument?
18 Overruled. Mr. Frankel, please proceed.

19 MR. FRANKEL: Thank you, Your Honor. The reason
20 that I raise that, Your Honor, is that we think it is
21 relevant to exclusivity the choices that the debtor makes
22 four years into a case as to what kind of plan they file.
23 This is a case where they could have filed a plan that --
24 okay, perhaps they didn't want to have asbestos claimants
25 voting. I understand why they wouldn't want to do that. We

1 think that by itself makes the plan un-confirmable, but
2 that's not for today. But they provided that the asbestos
3 claims, including the property damage, including the personal
4 injury, including the future personal injury claims cannot
5 exceed \$1.7 billion. Now they could have just as easily
6 filed a plan that provided that if they exceed 1.7 or 2 or 3;
7 what happens? That would not have been difficult, but they
8 chose to file a plan that caps asbestos liabilities or makes
9 their plan un-confirmable, and it's for that reason, Your
10 Honor, that we believe that a second plan, or for that
11 matter, other plans, but at least a second plan that at least
12 says what happens if it turns out at the end of this long
13 period that asbestos claims are in excess of 1.7 billion,
14 which we think is very likely, what happens? We shouldn't
15 have to go back to square one, give the debtor a chance at
16 that point to modify their plan, or at that point have a
17 battle over exclusivity. We think it would be very
18 appropriate at the end of the estimation process, whatever it
19 results in, that there be a confirmable plan on file. The
20 only other thing I'm going to say, Your Honor, is I
21 appreciate Mr. Bernick's remarks with regard to Mr. Austern.
22 Mr. Austern made the determination to file this opposition
23 because he does believe that a level playing field will
24 result if exclusivity is terminated. Thank you.

25 MR. HURFORD: Good afternoon, Your Honor. Mark

1 Hurford of Campbell & Levine. Frankly, Your Honor, I
2 prepared a more lengthy argument, but going third and at this
3 point in time in the hearing, I guess it would be best for me
4 to respond to some of the particular issues that have been
5 raised. And one of the issues I would like to respond to was
6 a comment from debtor's counsel which was raised a couple of
7 times regarding why, and you, I'm sure, have read the PI
8 Committee's papers, the PD Committee's papers, and the Future
9 Rep.'s papers as to why the plan that's currently on file is
10 un-confirmable. And the reason is, and this is cited in the
11 debtor's own papers, that one of the factors the Court
12 considers in determining whether to extend exclusivity, is
13 whether the debtor has demonstrated reasonable prospects for
14 filing a viable plan. Obviously, it knows our position.
15 They have not filed a viable plan. Mr. Frankel just stated a
16 few reasons for that. Mr. Baena stated a few more reasons
17 for that. From our point of view, very simply boiled down,
18 the Asbestos Committee has the right because they are
19 impaired to vote on the plan under 1126. They also have the
20 right, in fact, they're required to vote on the plan under
21 524(g). We are required to vote. So, as far as the debtors,
22 whether or not they're taking that position at this hearing,
23 I'm really not sure, but they have demonstrated reasonable
24 prospects for filing a viable plan. I don't think that
25 exists. The debtors also comment on negotiations with

1 creditors. The element cited in the debtors' own papers is
2 that whether the debtor has made progress in negotiating with
3 creditors, there seems to be some disagreement as to whether
4 or not the debtors have been negotiating with the PD
5 Committee. I can tell you they have not been negotiating
6 with the PI Committee, at least in the last six months. I'm
7 not sure for the rest of these people. Regardless, the
8 papers generally referred to, quote/unquote, "capitalized
9 term, asbestos parties." That capitalized term, as far as I
10 can see, was not defined in the motion. Regardless, nowhere
11 in their motion do they say that they made progress in
12 negotiating with the creditors. Not that they're
13 negotiating, but that they've made progress. And I guess my
14 last bit of comments, I would like to get back to the --
15 somewhat the theme of the PI Committee's objection, and that
16 is that throughout this case any legitimate movement that has
17 been made in moving these cases forward has been done
18 pursuant to comments that Your Honor has made on the record.
19 Your Honor may recall that after the PI Committee objected to
20 the fifth motion to extend exclusivity, that Your Honor
21 instructed the parties to meet and confer. There was one
22 teleconference that was held after that. By no means could
23 that be considered a good faith attempt at reaching a
24 resolution of these cases. Thereafter, this Court raised
25 concerns in connection with an argument on a general

1 unsecured claim with regards to what progress the debtor was
2 making and questioned the need to replace the debtors -- the
3 debtors in possession to see if something can get done.
4 Thereafter, in connection with the PI Committee, and I think
5 there were other objections filed as well, to the debtors' --
6 the Grace debtors' sixth motion to extend exclusivity, this
7 Court raised the question whether or not these debtors would
8 even be seeking a 524(g) injunction. That question could not
9 be responded to, and your Court ordered them, by the next
10 omnibus hearing, to either file a motion or to come and state
11 on the record, unequivocally, what they were going to do.
12 Because of Your Honor's statements, a Futures Rep. was
13 finally appointed, and because of Your Honor's statements
14 again at that hearing, which if I recall correctly, mentioned
15 specifically the appointment of a trustee despite an
16 acknowledgement of what that might do to the debtors'
17 financial lenders may be necessary. At that point, the
18 debtors came in and said, We will be filing a plan. Now, the
19 second round of legitimate negotiations that went on in this
20 case, went on around that time, and to my knowledge, nothing
21 has gone forward since that period of time. Like I said,
22 Your Honor, the steps that have been made, the actual steps
23 in progressing this case, has been made by Your Honor pushing
24 the debtors to do them. And what this really comes down to
25 is litigation. Do we want to litigate for the next several

1 years of these cases or do we want to level the playing
2 field, see if the other creditors can step forward and do
3 what the debtors have failed to do, reach some agreement
4 amongst the creditors. Now granted, there maybe there will
5 need to be estimation. Maybe that estimation process can be
6 streamlined as it has in numerous other cases I can think of.
7 Armstrong, which considered the debtor's pre-petition
8 settlement history. Owens Corning, which considered the
9 debtor's pre-petition settlement history, which, by the way,
10 it certainly was not an uncontested issue in Owens Corning.
11 There were a number of motions filed to establish an asbestos
12 personal injury bar date in Owens Corning that were never
13 granted. And in that case, it was decided to move forward
14 with estimation. Judge Wolin said in that case that if he
15 didn't think there was appropriate information that he could
16 rule on estimation, that he wouldn't, and he would consider a
17 personal injury bar date. He apparently decided he didn't
18 need it because, obviously, as we all know, he ruled. And
19 more recently in Federal Mogul, the Asbestos PD Committee led
20 by Rod Gotshall in that case, objected, but there was a
21 hearing estimation that was based upon the debtor's pre-
22 petition settlement history. I guess what we're asking for,
23 Your Honor, is a leveling of the playing field, and I
24 mentioned this in my papers. We will conceive that there's
25 no alternative plan that's ready to be filed. But, Your

1 Honor, as we approach others to negotiate, where the general
2 unsecured creditors under the current plan are supposed be
3 getting a hundred cents on the dollar plus post-petition
4 interest, and equity are going to be retaining such a
5 substantial percentage,, where is the level playing field?
6 Now, Your Honor's asked us to go into negotiation next week.
7 We will certainly do that, but, to date the debtors haven't
8 been able to move this case forward on this playing field,
9 and we're asking that the playing field be leveled so that
10 other parties can bring forward plans, and maybe these cases
11 can be resolved much quicker. The time line that debtors'
12 counsel has just proposed considers a hearing in December of
13 2006 for asbestos personal injury claims. And, like I said,
14 Your Honor, that's really what this all comes down to.
15 Actually, I believe I said I was only going to respond to one
16 more, two more things, but let me respond to one other issue
17 raised by debtors' counsel and that is the assertion that the
18 Asbestos PI Committee is concerned with the ongoing briefing
19 for the debtors' proof of claim/questionnaire, and that we
20 are suddenly objecting to the debtors' extensions of
21 exclusivity because of the pressure felt by that. As the
22 debtors' papers point out, they filed on day one a motion for
23 a procedure which I've gone back and studied it, but it's
24 very, very similar to the procedure that they're seeking to
25 undertake now. That's been pending in these cases. If we

1 were really that scared and we're objecting to exclusivity
2 because of that, we would have objected to every motion to
3 extend exclusivity. We haven't. We objected to the fifth.
4 We objected to the sixth, and we objected to the eighth. We
5 didn't object to the seventh because there actually were some
6 negotiations that took place during that time period, and we
7 believe that's the relevant time period for Your Honor to
8 consider. But there were some negotiations that took place
9 and the debtor filed a plan. In the next six months, nothing
10 has happened. We're back to square one, and as Your Honor
11 knows, we would ask that you lift exclusivity, level the
12 playing field, and allow the other creditors to see if we can
13 move this forward -- case forward much more expediently.
14 Thank you.

15 THE COURT: All right, Mr. Hurford, you actually
16 raised something that I wanted to inquire about and haven't
17 yet, and that is, if I do terminate exclusivity, what does
18 that do to the debtors on the business side? Because
19 frankly, I'm not seeing much progress, and I think the case
20 needs more. So, I don't know that I'm prepared to terminate
21 exclusivity today, but I think I am prepared to put an end to
22 exclusivity, an end date to exclusivity, and it's not going
23 to be December of 2006.

24 MR. HURFORD: I'm not sure that I'm prepared to
25 answer the question as to what that would do to their

1 business. I mean, obviously, they have their plan on file.
2 They can continue to push for their plan. As Mr. Frankel
3 pointed out, when we reach the end of the day, their plan --
4 Well, maybe people can dispute whether or not their asbestos
5 liabilities will exceed 1.7 billion, but assuming it
6 surpasses that, which we certainly believe it will easily,
7 their plan goes nowhere. If we can file another plan or we
8 can reach some other agreement to litigate this case so that
9 it's not six years old when we're finally getting estimations
10 --

11 THE COURT: I've heard the argument. I want an
12 answer from somebody to the issue, the financial issue.
13 That's what I'm concerned about at the moment. What will the
14 consequence, if there is a termination of exclusivity, be on
15 the debtors' business side of things and the financial
16 issues, not on the rest of this. That's what I'm concerned
17 with.

18 MR. BERNICK: I don't know that anyone really here
19 in court today really is sufficiently informed to address
20 that. I know that I'm not on behalf of the debtor, and know
21 that the debtor does not have representatives here that are
22 capable of doing that. We would be happy to inform the
23 Court, make a submission to the Court with respect to that
24 particular issue, but I would like, Your Honor, just briefly
25 to address some of the points and then maybe make a proposal

1 about going forward in light of Your Honor's question, if I
2 could, and I'm not going to respond to all the different
3 points that have been made. The fact of the matter is that
4 there's a lot of discussion about the playing field and
5 whether it's level or not. The principal obstacles to
6 settlement are not a question of determination or resolve.
7 They're not a question of management approach. They're not
8 even necessarily a question of the approach of these
9 committees. The principal obstacles to settlement, I
10 participated in some of the discussions and in a lot of the
11 internal discussions about where it's going, and I've also
12 resolved other cases. The obstacles are facts. They're
13 basic facts. People have a very different sense of what it
14 is that they're entitled to. Your Honor gets a flavor with
15 respect to the traditional property claims on how different
16 the perspectives are of the debtor versus Mr. Speights. Your
17 Honor has a perspective from the ZAI claims and how different
18 the perspectives are of the litigants with respect to those
19 claims. When it comes to personal injury, in a sense that's
20 the most difficult problem because it's the most complex one,
21 and there are also more procedural areas to resolving those
22 claims because they're personal injury claims. But let me
23 point out a couple basic public facts that ought to give Your
24 Honor a flavor. Right now, Grace's stock is trading at
25 values that are higher than they've been before. Grace's

1 stock has equity value. Why does it have equity value?
2 Well, it has equity value probably in large part because of
3 the legislation. Beyond the stock, however, you find the
4 creditors, not only in the Grace case, but in other cases,
5 indeed in cases where equity is no longer really at issue,
6 like Owens Corning or like Federal Mogul. Those are all
7 cases that were cited. Equity is not at issue in those
8 cases. Who is it that's mounting the attack on the
9 traditional estimation methodology that the personal
10 injury claimants have used? It's the other unsecured
11 creditors. So, it's not a question of equity. It's a
12 question of, What are those claims really worth? And the
13 problem is that there is a broad perception that is out there
14 in large part because of the legislation but also as a result
15 of data that's now been produced in these cases, in
16 Congoleum, in this case, and elsewhere, data that shows that
17 there is a major, major problem when it comes to how some of
18 these claims are actually developed and lodged. The
19 screening trailers, the mass factories of claims that are
20 being used. You can't ignore that. That's just a fact
21 that's out there. That's a problem to wrestle with in these
22 cases, and unfortunately, there's no simple way to say, Well,
23 what is really the impact of that? Now, Judge Farnan, in the
24 context of the Owens Corning case took an approach that said,
25 Well, here's a high estimate, here's a low estimate. Boom.

1 I can't tell you the math but here's something that's in
2 between. I suppose that's one way to go about doing
3 business. But even he considered the impact of those
4 different issues about whether the claims are really bona
5 fide claims or not. So, this problem of whether the PI
6 claims really work is an enormous problem, and there has to
7 be a methodology for dealing with it. That's what creates
8 the barrier. If you lift exclusivity and other people file
9 plans, we know exactly what it is that's going to happen.
10 People will come in and simply reflect in their plans their
11 particular perspective on what their claims are worth. And
12 they'll then seek to battle out, now in the context of
13 competing plans, exactly the same issues that are the subject
14 of the estimation.

15 THE COURT: I agree, which is why we have to do the
16 estimation unless you can come to a settlement. Look, there
17 are limited ways in which you can estimate anything. Whether
18 the settlement history is something to be considered seems to
19 be an issue that's dividing this case that hasn't divided all
20 other cases. That's one reason why the trials have been
21 somewhat different in some of the other cases.

22 MR. BERNICK: Your Honor, I would disagree a little
23 bit.

24 THE COURT: Even consensual.

25 MR. BERNICK: In the Owens Corning case, there was

1 no issue about whether settlement history should be used as
2 the predicate for the estimate.

3 THE COURT: Well, I agree.

4 MR. BERNICK: And the reason for that is that no
5 one believes -- everybody knows in the Owens Corning case
6 there is no equity. So, it's just a question of
7 proportionality between the different claimants -- between
8 the different creditor constituencies. And that's happened
9 before. But there is --

10 THE COURT: But, look -- but this plan, as you
11 currently -- as the debtor currently has it crafted, this
12 plan has to be a one hundred percent plan for all allowed
13 claims.

14 MR. BERNICK: That's correct. That is absolutely
15 correct, and people say -- people say, Well, it's not
16 confirmable on its face. We went through the technical issue
17 of whether there's impairment or not on the face of the plan,
18 but whether it's confirmable or not is inevitably driven by
19 their sense of how the facts will turn out. If it turns out,
20 and I will tell Your Honor that a lot of people are standing
21 up talking in this Court who don't have a clue about what
22 went into the formulation of the plan. They didn't even talk
23 to their clients, and they're making representations about
24 what the plan is or is not. This plan was constructed in
25 large part driven by the very settlement discussions that

1 have taken place. There are different pots of money that
2 have been set up based upon the debtors' sense of how to
3 accommodate conflicting views among the different creditor
4 constituencies. So we put money in those pots. If it turns
5 out that we're right about the estimates, that is that there
6 will be payment in full for the symptomatic claimants, that
7 the asymptomatic claimants will be as unsuccessful as we
8 believe that they are and is the marketplace for the
9 resolution of claims, now says that they are. Asymptomatic
10 claimants are nowhere in those states and the market for
11 their claims has dropped. It's almost like what happened at
12 Dow Corning in the disease claims. It's dropped through the
13 floor. So if we're right on how much money should be
14 allocated to those claims, and we're right about Mr.
15 Speights' claims, which doesn't take much scrutiny to
16 determine, and we're right about Mr. Dye's claims which are
17 worth far more money than Mr. Speights' claims are, and we're
18 right about CAI which we believe that we are on the facts,
19 this plan was crafted to give money to all constituencies
20 weighing and balancing their radically different views about
21 what the claims are worth. This is not a situation of being
22 such a debtor friendly plan. This is a plan that most of all
23 is driven by a process that says, Here's the money that we
24 think belongs here, but let the estimation determine what it
25 is, and those facts will drive any plan. They come in there

1 with their other plans, we're going to be back at ground
2 zero. So, the question becomes, Your Honor, I think the
3 question that Your Honor focused on, Your Honor's unhappy
4 with the progress of the settlement negotiations. We are
5 unhappy. There was a concerted effort to try to get that
6 plan before it was filed to be supported by everybody, and
7 then when it became clear that we weren't going to get
8 certain constituencies, we didn't give up, and we said, Well,
9 let's see how many more we can get, and we got equity and we
10 got the unsecured. We were hammering tacks to get property
11 to sign onto this plan. So, what now would happen if Your
12 Honor were to say, I'll extend exclusivity, but by God, I
13 want to know (a) if there's an impact on the debtor if it's
14 terminated, and (b) it's going to be extended no further than
15 X date. What does Your Honor suppose is going to happen? If
16 there had been objections and delays as you're now going to
17 hear there have been objections and delays to our case
18 management orders before, they are now going to be -- Your
19 Honor, it's not working out.

20 THE COURT: Look, folks, let me explain something.
21 Orders are signed by me. If you folks can't agree on a case
22 management order, you're going to get one, and it's going to
23 be my dates and my time frames. I would like your input into
24 that because I would like to know reasonably how much time
25 you need for discovery. But if it's overly delayed, it's not

1 going to work, I will give you different dates, and that's
2 how it's going to be. We're simply going to get this done.
3 And I don't see, Mr. Bernick, that we're getting it done. I
4 really don't.

5 MR. BERNICK: Your Honor, we have before you the
6 case management order for property damage. We were prepared
7 to have expert reports exchanged late this summer or early
8 fall. It was the property damage claimants that said, No,
9 we're not going to be ready. So, we've accommodated them,
10 and we've extended the schedule some more.

11 THE COURT: All right.

12 MR. BERNICK: Your Honor, we're prepared to do this
13 tomorrow.

14 THE COURT: Mr. Bernick, the property damage and
15 the personal injury can march side by side. They don't have
16 to, despite Judge Wolin's original game plan, which may have
17 made sense back in whenever he was appointed to the case, it
18 doesn't have to be the way it is now. So, there isn't any
19 reason why they can't march side by side. I'm happy with a
20 form if that's what the debtor wants to try to do to see
21 whether or not some vital information on the personal injury
22 side can be adduced so that everybody can make use of it for
23 whatever your position's going to be on the estimation
24 hearing. But that can be done in a much more rapid fashion
25 than requiring a trial in December of next year.

1 MR. BERNICK: Well, we're prepared to do that.
2 We're absolutely prepared to do that. But, Your Honor, you
3 see how even the dialogue starts to effect the substance of
4 the process. Unless the information is gathered and gathered
5 carefully, the process is no better than the information. If
6 the process is operating under a time constraint that is
7 imposed because the parties won't settle rather than being
8 imposed because the information can't be gathered, then what
9 you're going to do is end up sacrificing the quality of the
10 information which will sacrifice the quality of the
11 estimation and make it more amendable to attack. We believe
12 that this schedule can be compressed, we absolutely do. And
13 we're prepared to do anything that's necessary to expedite
14 this schedule. All that we want is the information. We'll
15 propose to the Court -- we have already a CMO that's before
16 the Court on the property side. We'll propose a CMO to the
17 Court with respect to personal injury that's more
18 accelerated. We're happy to do that, but, Your Honor, if
19 that process is going to be followed seriously, like any
20 other piece of litigation, (a) you can't give one side or the
21 other or anybody an external point of leverage. And here the
22 external point of leverage is exclusivity. If Your Honor is
23 not satisfied with how the litigation is working or Your
24 Honor is not satisfied that the parties are not operating in
25 good faith from a settlement point of view, I would urge that

1 Your Honor be driven by those as factors rather than
2 artificially setting a date at this time because otherwise
3 people will gain the date. It happens every time.

4 THE COURT: I've ordered you to get together next
5 week. I want you to see whether or not next week you can
6 come up with an agreed upon schedule for the property damage
7 on the one side and for the personal injury on the other.
8 That includes a claim form which can be produced. I will
9 approve a claim form of some sort. I'm not saying what sort,
10 but I will, folks, approve a claim form because it may be
11 useful to all parties in the estimation, and I will consider
12 it appropriate discovery. Rather than taking depositions of
13 400,000 personal injury plaintiffs, we're going to do it
14 through claim forms. So, it will be approved. Now, you
15 folks can get together and see if you can agree on the
16 information. I don't expect a 20-page claim form, Mr.
17 Bernick. That will be outrageous. It will not be necessary.
18 But some basic information, yes. I think the debtor and all
19 the other parties will benefit from it. So your task, next
20 week, all of you, I'm not speaking just to Mr. Bernick,
21 everyone is to get together in a face-to-face meeting for
22 however long it takes. Take your toothbrushes to see whether
23 or not you can get case management orders that are agreed on
24 for both the property side and the personal injury side.
25 There is no need to piggyback those two orders. They can be

1 done simultaneously. That's number one. Number two, if you
2 can't agree, then before the July 18th hearing, you will
3 submit your separate versions, and I will craft a case
4 management orders in both of them and a personal injury claim
5 form. You'll have all your appeal rights. I will not stay
6 the issue pending appeal because we're going to get this
7 done. This case needs to be out of bankruptcy. There is no
8 benefit to anybody having it here this long. It should be
9 done. Mr. Bernick, the plan has what I think is a defect.
10 Whether it's fatal or not, I don't know, but it has no
11 alternative to what happens in the event that the personal
12 injury estimates are greater than what the debtor thinks the
13 cap should be, and since it has to be a hundred percent plan,
14 there has to be some alternative.

15 MR. BERNICK: It does in fact have --

16 THE COURT: What does it say?

17 MR. BERNICK: -- a pressure relief valve on the
18 asymptomatic side. But, Your Honor, again, I --

19 THE COURT: The symptomatic side could be higher, I
20 don't know.

21 MR. BERNICK: It could be, Your Honor, but again,
22 all the questions are right on but the difficulty is that
23 when you say that that is a defect, there are enormous
24 ramifications for that, and --

25 THE COURT: Well, I will use the word --

1 MR. BERNICK: -- I'm not -- What I mean --

2 THE COURT: -- problem.

3 MR. BERNICK: -- to say is that you really have to
4 get down to the analysis of, Well, what happens if the
5 estimate turns out to be higher, the same, or lower? What
6 happens to that alleged defect. For example, if Your Honor
7 does an estimate of the symptomatic claims and says the
8 estimate is below the amount of money that's there, is there
9 really a defect at that point in time? If there is not, then
10 Your Honor's question was raised by counsel which is, What
11 if? What does saying that the what if must be addressed in
12 this plan do to the negotiation process. Inevitably it
13 means, that one party's going to sit there and they're going
14 to try to bust the cap --

15 THE COURT: Fine.

16 MR. BERNICK: -- solely for saying that the plan is
17 non-confirmable.

18 THE COURT: Look, the number at the moment is not
19 relevant. What's relevant is what dividend the debtor's
20 going to pay to whoever is entitled to get it. Let's get
21 down to the fact that that's how bankruptcy plans work. The
22 number is only symptomatic of what that dividend
23 expectation's going to be. I mean, the debtors may have an
24 expert already who's willing to put the number at 1.7
25 billion, maybe that's the case. The other committees may

1 have -- just to pick numbers out of the air -- estimates who
2 are willing to say the number's \$50 billion.

3 MR. BERNICK: And the key is, Your Honor, that once
4 the claim -- We're all operating -- If it were just a
5 question of that, it would have been done. Why can't people
6 do it? It's not just because they have different models.
7 It's not even because they have different approaches. It's
8 because they don't have the information. If you got the
9 information, you can do deals. Let me make one last thing,
10 and I'll -- Your Honor, then I promise I'll shut up.

11 THE COURT: Well, who has the information?

12 MR. BERNICK: The plaintiffs' lawyers do because we
13 don't have -- that's the whole idea of the claim form.

14 THE COURT: So does the debtor on the settlement
15 side. So --

16 MR. BERNICK: We've given it on the settlement
17 side. The problem is that you cannot -- and I'd try if I had
18 time, you can't take the history of settlement and determine
19 from that reliably the impact --

20 THE COURT: Mr. Bernick, what you can determine
21 reliably from that is how the debtor has settled cases in the
22 past.

23 MR. BERNICK: Right.

24 THE COURT: This is a trust that's going to be
25 created.

17 MR. BERNICK: Your Honor, I don't mean to argue
18 with you, but at the end of the day -- I mean, I could draw
19 you a picture that says, Okay, you've got that settlement
20 history, and what you're really going to do is if they get
21 their way, they extrapolate off from the top of it, you know.
22 I won't argue. You already know what that issue is. The
23 question is, depending upon which issue comes out that is
24 asymptomatic, as an example, or requirements for product
25 identification, as an example, depending on how those issues

1 come out, how much of that prior curve do you strip away?

2 THE COURT: I agree.

3 MR. BERNICK: Okay. Now, that's what the claim
4 forms will tell us.

5 THE COURT: I've already said --

6 MR. BERNICK: Okay.

7 THE COURT: -- I will agree to some form of claim
8 form, not a 20-page claim form.

9 MR. BERNICK: Well, take a look -- I don't know
10 offhand how long it is. Whatever it is that Your Honor said
11 before and that we complied with it, it's a shorter form. It
12 is detailed. It's going to require work because unless you
13 do it, you end up with the same kind of claim manufacturing
14 that we've had in the past. But I have a way, Your Honor, I
15 think, and I'll just say it. It's two propositions:
16 Propositions one, is that rather than setting some date now
17 or a week from now or two weeks from now for termination of
18 exclusivity, we focus on getting the litigation track set,
19 including the part of it that will involved obtaining
20 information. And Your Honor, we'll meet and confer on that,
21 and if we can't agree, we'll comply with Your Honor's order,
22 we'll submit schedules and Your Honor can enter the order.
23 That really, after all, was where we were back in 2001 with
24 Judge Farnan. With respect to the settlement side and the
25 need for Your Honor's sense that the debtor is not acting

1 promptly enough, and I won't argue with that --

2 THE COURT: It's all parties, Mr. Bernick. I
3 haven't -- I'm hearing that the debtor hasn't made any
4 efforts to get together. I'm not hearing from the debtor
5 that anybody else's calls have been unanswered. You're all,
6 as far as I can -- I mean, the debtor's not saying, Gee, the
7 Asbestos Committee called and we said, No, we can't talk to
8 you. Nobody's negotiating.

9 MR. BERNICK: To the contrary. We have pushed it,
10 and that's why it's so frustrating to hear people who don't
11 know.

12 THE COURT: Stop.

13 MR. BERNICK: Okay.

14 THE COURT: I have ordered you to get together.
15 That's where I'm going. I'm ordering you, and frankly, in
16 five minutes we're terminating this case until next week, so
17 talk fast because that's it.

18 MR. BERNICK: I've got my second point and I'll
19 shut up because I think it's a good one that will solve a lot
20 of problems. If Your Honor wants to bring somebody else into
21 this process to be able to report to the Court on whether in
22 fact the parties are being diligent in operating in good
23 faith in the settlement discussions, we've not done that so
24 far, and maybe that's a way of Your Honor developing better
25 assurance that the settlement process is moving forward. I'm

1 not suggesting some kind of, you know, big deal type of
2 thing. I want some way of breaking the information gap
3 that's bothering Your Honor. Your Honor doesn't know what's
4 happening on the settlement side because people are making a
5 bunch of representations and you don't know what's accurate.
6 I think it might make sense to have somebody that's in a
7 position to know what the story is so that Your Honor doesn't
8 have to do something like set a court date or an exclusivity
9 termination that is driven by your sense of the lack of
10 progress but inevitably will have unintended consequences
11 with respect to the negotiation itself, and to my observation
12 also the litigation. There's a much more focused cure which
13 is to get a source of information to Your Honor on whether in
14 fact the settlement discussions are taking place and are
15 active. And that's my last proposal.

16 THE COURT: Did you get into our calendar yet? See
17 if you can get Connie and get our calendar. Gentlemen, this
18 is what I'm going to do. I am going to grant a brief, and I
19 do mean brief, extension of exclusivity until I get this set
20 for an argument date in Pittsburgh, at which we're going to
21 address, however long it takes, bring your toothbrushes, the
22 case management order both for property damage and personal
23 injury, if that's necessary, the claim form, and the
24 extension of exclusivity. Mr. Bernick, to a certain extent,
25 the consequences in terminating exclusivity would be

1 intended, because if I don't see substantial progress, maybe
2 it's time that somebody else gets a shot. What I do not want
3 to do is terminate what seems to be a pretty viable business
4 on behalf of the debtor by a termination that may have
5 consequences that I don't intend on the business side. So,
6 for that hearing, I want to know specifically from the debtor
7 and anybody else, financial advisors, what the consequences
8 will be. I consider that to be a significant issue in this
9 case, particularly where the debtor is telling me it's
10 solvent. Now, do I know whether the debtor's solvent?
11 Obviously, no. That's not an issue that has come before me
12 in a litigated or even a settlement context. So, I don't
13 know. I don't know whether or not the debtor's plan is --
14 I'll use the words "rich enough" to satisfy the claims. I
15 simply don't know. I haven't heard the evidence, and it's
16 time that I start getting the evidence. All of you are
17 charged with getting in touch with each other to negotiate a
18 settlement. All of you, and I don't, from this day forward,
19 want to hear one complaint that somebody hasn't contacted
20 somebody else to move the case to get forward with
21 settlement. Mr. Bernick, I'm holding you personally
22 responsible for making calls on a weekly basis to start
23 settlement discussions and, folks, you'd better be there to
24 answer them or return those calls promptly. Because if I
25 hear that you haven't then I will have some other

1 consequences. Mr. Hurford -- No, I want -- give me like two
2 months' worth, because I'm going to try to schedule some
3 dates. Mr. Hurford?

4 MR. HURFORD: Thank you, Your Honor. Having heard
5 that I'm somewhat hesitant to be standing here, but obviously
6 this motion, the objection to the motion to extend
7 exclusivity has gone far afield and Your Honor seems to have
8 made at least a preliminary ruling that you will be entering
9 an order approving some sort of asbestos personal injury
10 claim form.

11 THE COURT: I expect to.

12 MR. HURFORD: Well, I rise to ask Your Honor to at
13 least withhold decision on that issue. First of all, and as
14 Your Honor knows, Mr. Lockwood typically addresses matters
15 regarding asbestos, personal injury --

16 THE COURT: Yes, and I've heard his recitation in
17 at least six other cases, and I doubt that it's going to
18 change in this one. I could probably give it back to you.

19 MR. HURFORD: Well, it probably won't, Your Honor,
20 but I guess his recitation is somewhat successful because,
21 from what I know, in the Babcock case an asbestos personal
22 injury bar date, proof of claim form was entered and thrown
23 aside.

24 THE COURT: Why?

25 MR. HURFORD: And that Court finally said, No --

1 THE COURT: I said nothing about a bar date. I
2 said a claim form. And the reason for the form is that the
3 debtor's view as to how an estimation hearing is going to
4 take place and the rest of the world's view is very
5 different. I want to see what comes out of the claim forms.
6 The debtor has the right to discovery to know what the
7 current claims are, and that will be a much better basis for
8 estimation of current claims and possibly future claims than
9 anything else. So, let's get it done. Let's find out what
10 the claims are, what people say they have by way of claims.
11 That number may turn out to be some astronomical number which
12 is meaningless, but it may also, if counsel does their job
13 right, be a legitimate basis for figuring out what the claims
14 are.

15 MR. HURFORD: Your Honor, that was the same track
16 that was taken in USG and Judge Wolin decided was not
17 fruitful.

18 THE COURT: I don't care what the other judges have
19 decided. This is this case, this is how we're going to do
20 it. So, go work on a claim form that you can live with,
21 folks, you're going to get one. If you can't work on one
22 that you can live, I'm going to do it, and you know a whole
23 lot more about it than I do.

24 MR. HURFORD: I understand, Your Honor, but this
25 exact issue is pending briefing. The debtors' motion for

1 approval of this case management order and their proof of
2 claim or questionnaire or whatever you want to call it is
3 under consideration. Our objection is due at the end of the
4 month, which reminds me of an issue that I need to raise with
5 you at the end of the hearing, but the matter hasn't even
6 been briefed, Your Honor, and if Your Honor --

7 THE COURT: Okay, you can brief it.

8 MR. HURFORD: -- will give us time.

9 THE COURT: Yes, you certainly may brief it, and
10 you can brief in light of the fact that in all probability
11 you're going to end up with a claim form, please. You've
12 argued. You've heard what I have to say, please, let's get
13 to it.

14 MR. HURFORD: Thank you.

15 THE COURT: Mr. Hurford, what other issue did you
16 want to raise?

17 MR. HURFORD: I'm not sure how much of this history
18 you'll need me to recite, but if Your Honor will recall the
19 debtors had a deadline to file their opening brief. In
20 connection with filing the opening brief, they filed a motion
21 to exceed the page limitation and asked for an additional day
22 to file their briefs. Aside from their motion, their
23 memorandum of points and authority is 75 pages long, aside
24 from all the exhibits which number several hundred pages.

25 THE COURT: Okay.

1 MR. HURFORD: What I'm getting to is, the parties
2 jointly submitted a motion, and it was all major
3 constituencies, asking that the local rules with regards to
4 page limitations be waived. Your Honor black-lined that
5 order down to 60 pages. What we're asking for is an ability
6 to file an answering brief and the equivalent number of pages
7 as the debtors, which is 75 pages. We don't feel --

8 THE COURT: Fine, okay, fine.

9 MR. HURFORD: Thank you.

10 THE COURT: Seventy-five pages is fine.

11 MR. HURFORD: We appreciate it.

12 MR. BAENA: Your Honor, in regard to the property
13 damage CMO, just so that there's no misapprehension, Your
14 Honor will recall that in April I shared with you that it was
15 revealed to us shortly before that hearing that the debtor
16 intended to take on the science, if you will, of all of the
17 products that engender property damage claims. Your Honor
18 shared our surprise by that revelation. At the end of that
19 hearing we indicated that we were going to continue to work
20 on a case management order, and we came back before you in
21 May, and at the May hearing apprised you that because of the
22 deliberations and what have you, both sides came to the
23 conclusion that the dates had to be changed.

24 THE COURT: Yes.

25 MR. BAENA: Okay, and we were supposed to work on

1 it again. Ms. Baer indicated that she was going to be
2 talking to her property damage litigation experts within the
3 next week after that hearing. Just this weekend, on
4 Saturday, we received the very next iteration of a case
5 management order.

6 THE COURT: Well, if you're ahead of me, I haven't
7 seen it yet.

8 MR. BAENA: It hasn't --

9 THE COURT: So, I'm not addressing it today.

10 MR. BAENA: I'm not addressing it, but I want to
11 make sure you understand, Judge, that the issue isn't just
12 timing. The issue is what are the issues that are engendered
13 by the estimation process in respect to property damage. And
14 this new CMO creates a whole new track that I've had about a
15 day to digest at the present time, and it creates this whole
16 new track that has to do literally with two matters that
17 weren't even subject of the prior CMO. My point, Judge, is
18 that --

19 MR. BERNICK: Your Honor, we -- I have to object.
20 This --

21 THE COURT: Mr. Bernick, please. Let's get
22 finished with this. I've heard enough. Mr. Baena, what,
23 what's the point?

24 MR. BAENA: My point is, Judge, we're not going to
25 just be arguing about time. We're going to be arguing about

1 scope.

2 THE COURT: I understand that.

3 MR. BAENA: Okay. And I just wanted to make sure
4 that whatever you schedule gives us an opportunity to argue
5 about scope, brief and argue about scope.

6 THE COURT: I told you to bring your toothbrushes.
7 I meant it.

8 MR. BERNICK: In preparation for that, it would be
9 helpful if counsel for the Property Damage Committee could go
10 back to the pleadings that were filed in the first day of
11 this case, set out the scientific issues, defenses, including
12 this defense and in the Armstrong decision itself. The whole
13 idea that this was a surprise last time is completely
14 apocryphal.

15 THE COURT: Mr. Bernick, I wasn't involved in the
16 case in the first day of the case either, and I'm not going
17 back and take a look at that either. File something that's
18 current so we all know what's going on in the case and what
19 the debtor's perspective is. I want to see some movement,
20 and frankly, this little bit of infighting is getting to the
21 point where it's not helpful. So, if I need new counsel --
22 not new counsel, but a trustee for the debtor, if I need new
23 counsel for the committees, sobeit, folks. That's the level
24 I'm at. I'm tired of the infighting. I expected to see some
25 progress, and I expect to see it by the time we have the next

1 hearing with respect to these case management orders. And if
2 you can't do it, as I said earlier you'll get the orders from
3 me the way I craft them. So, take your best shot, because as
4 I said before, you're much more expert at this than I am.
5 I'll do my best. Yours is probably better. Mona, dates.

6 Well, actually it looks as though the best date to
7 try to do this may actually be the day after the next omnibus
8 hearing, which is July 19th, the next omnibus is the 18th. I
9 apparently have half a day on Tuesday, July 5th. I'm sure
10 none of you will be too thrilled with that, but it's only
11 half a day. And that's it, until the 19th of July. That
12 would give you virtually three weeks or almost a month to get
13 together, several times, to negotiate and see what you can
14 resolve and to file whatever briefs you'd like me to see on
15 whatever issues you still find are pending that you've not
16 been able to resolve. So, how's July 19th for a hearing
17 date? Which means we will not have any of these issues on
18 the July 18th calendar. We will have business related
19 issues, not case management, not plan, not exclusivity. They
20 will all be on July 19th, not issues related to the plan.

21 MR. BAENA: Is there going to be a briefing
22 schedule, Judge?

23 THE COURT: Well, we'll have to develop one. If
24 July 19th is fine, let's pick that and we'll work backwards.

25 MR. BAENA: If I could be so bold, Judge, I have a

1 trial that starts the following week in Vermont, and that is
2 a little bit of a difficulty for me, but if this is it, I'll
3 just abide by the Court's request.

4 THE COURT: That's the day that I have in July.
5 Would you prefer to do it in August? I mean --

6 MR. BAENA: (Microphone not recording.)

7 THE COURT: Then we're back to everything slipping
8 again.

9 MR. BAENA: Well, I'll abide by whatever the Court
10 wishes.

11 THE COURT: All right, the debtors -- I'm not sure,
12 when does debtors' exclusivity terminate now?

13 MS. BAER: Your Honor, it would have terminated but
14 we filed the motion so the bridge order gives us until today,
15 and you need to enter an order today.

16 THE COURT: All right, debtors' exclusivity period
17 is extended to the conclusion of the hearing on July 19.
18 That hearing will be in Pittsburgh. Actually -- Yeah, it
19 depends on transportation time home. Let's plan on that
20 being in Pittsburgh but it's possible, because I'm here on
21 the 18th, but not the 19th, so it's possible that we may be
22 able to do it here. Are you going to have other issues teed
23 up for the 18th?

24 MS. BAER: Your Honor, there are a couple of
25 motions. They're not particularly significant. They're

1 business related type motions.

2 THE COURT: Are they likely to settle so that
3 there's no hearing that's going to be held?

4 MS. BAER: They're very likely. The information on
5 them has been shared. One of them's a long time incentive
6 plan, we haven't heard back, but it's an extension of last
7 month's, and I can't even remember any other thing that's on
8 right now. It's minimal.

9 THE COURT: Right. What I'm trying to get to is
10 would you prefer to move everything to the 19th in Pittsburgh
11 and not have an omnibus date on the 18th, but that's assuming
12 -- I mean, I want the majority of the day on the issues we've
13 been talking about today, not on the debtors' business
14 issues.

15 MS. BAER: Yes, they're very minimal.

16 THE COURT: Does everyone agree to that? All
17 right. The omnibus hearing date is continued to July 19 in
18 Pittsburgh beginning at -- Do you want to start at 8:30 or 9
19 o'clock, you pick; 8:30?

20 MR. BERNICK: I think we'll start at 9 o'clock.

21 THE COURT: Nine, all right. Okay. From the
22 debtor, within two weeks from today, let me give you a date,
23 see if that works. No, that won't work. It's going to have
24 to be a little shorter. By July the 7th, I want a report as
25 to the consequences of termination of exclusivity from the

1 business perspective. I'm not asking about the bankruptcy
2 consequences. I understand those. I think you all know from
3 the questions I was asking earlier, I'm concerned about, for
4 example, the debtors' lines and letters of credit, the
5 debtors' financing facilities, the debtors' business plans,
6 whether there is -- I'm not sure that some termination would
7 affect any of that, but I want to find out for sure.

8 Everybody else may respond to that by July the 12th in the
9 form of another report, if you choose. All right, Mr. Baena,
10 what issues is it that you want a briefing schedule for?

11 MR. BAENA: The scope of the PD estimation
12 procedure.

13 THE COURT: All right, well let me start with this:
14 When next week are you folks getting together to see what you
15 can resolve on the case management issues for both property
16 damage and personal injury? They can be separate meetings.
17 They don't need to have all of you together unless you want
18 the same schedule, which I doubt.

19 MR. HURFORD: Your Honor, I apologize. I'm really
20 not in a position to respond to that question. As most of
21 the people in this courtroom know, Mr. Inselbuch heads that
22 up for the Asbestos PI Committee. I have heard some
23 discussion that he has to travel to England in connection
24 with Federal Mogul.

25 THE COURT: You've got enough of a firm. He

1 doesn't have to be there personally. There are lots of other
2 people in the firm. That's one reason why his firm gets
3 appointed as counsel, that they have enough people to staff
4 it. So get it staffed.

5 MR. REINSEL: Your Honor, Rob Reinsel. I'm from
6 Kaplin, really sitting in for Mr. Lockwood. Mr. Lockwood is
7 out of the country I know this week and next. Regardless of
8 Mr. Inselbuch's schedule, we will accommodate the Court.

9 THE COURT: All right, what day do you want to meet
10 next week or can I just say next week and you folks can work
11 it out, but I don't expect to hear that you didn't meet.

12 MR. REINSEL: I think the latter would probably be
13 more preferable, Judge.

14 THE COURT: All right, property damage next week
15 and personal injury next week to work out two case management
16 orders. All right, so it will be after next, I guess, Mr.
17 Baena, after your meeting that your briefing would be due, so
18 next week is the week of the 3rd of July and the hearing's on
19 the 19th, which is a Tuesday. So I need briefs, I guess from
20 all sides at one time, with no opportunities for replay.
21 You'll just have to all tell me what you think the issues are
22 and brief them. Probably you can come up with a list of
23 issues at your meeting, I would think. You probably will
24 agree on the issues. How to handle them is probably going to
25 be the difference.

1 MR. BERNICK: Your Honor, I think that that's
2 probably the best idea. We ought to be able to reach at
3 least agreement on the areas in which we disagree, and I
4 think that simultaneous briefs probably makes sense. We have
5 been through this process before. I think it would be -- I
6 suppose what that means is that we'll end up taking pieces of
7 the brief that we have already submitted in connection with
8 the order. It will be, of course, about form and a kind of
9 recasting them to fit whatever group of issues we come up
10 with during our meeting next week. That's probably where all
11 this is headed. Do you want that briefing to be in a sense
12 all that you have to look at in connection with the hearing
13 on the 19th? I think you probably just have to have
14 simultaneous briefs and that will become the briefing with
15 respect to CMO and further extension of exclusivity. Does
16 that make sense?

17 THE COURT: I'm not sure that there's any more
18 briefing needed on the exclusivity; is --

19 MR. BAENA: It's just a report that --

20 MR. BERNICK: That's right. That's just the CMO
21 and -- right.

22 THE COURT: All right, so how about by July 12th,
23 all briefs due.

24 MR. BERNICK: It should be whatever Your Honor
25 needs by way of lead time for the 19th.

1 THE COURT: Well, I've got a real problem if I
2 don't get the briefs the morning of the 12th, even getting
3 them before the hearing on the 19th.

4 MR. BERNICK: So we should file them at that time?
5 I mean, I hate to say it, but would it be better if we do it
6 on the 11th?

7 MR. BAENA: We've previously e-mailed briefs of
8 this sort to you, Judge.

9 THE COURT: I know, but I think I'm going to be at
10 a place where I'm not going to have access to e-mail, I
11 believe, Mr. Baena, and that's what I'm worried about.
12 Actually, I could get them by e-mail if you can do them in
13 Word, not in Word Perfect.

14 MR. BERNICK: I really -- I don't know, that kind
15 of leaves out there the question of whether you ultimately
16 get them. I remember that happening before in an adversary
17 hearing.

18 THE COURT: Well, all right. This is what I'll do.
19 I'll give you an address where the briefs can be delivered to
20 me in hard copy. I'll give it to one person, one person
21 collect all the briefs, and I'll want them by -- I have to
22 have them on the morning of the 13th at the place I'm going
23 to be because I'm only going to be there the 12 and 13th, and
24 I'm leaving again, and they won't catch up with me. That's
25 the problem.

1 MR. BERNICK: We'll undertake -- If it's appropriate,
2 we'll undertake responsibility for being the collecting point
3 and then we'll figure out in order to get it to Your Honor by
4 the morning of the 13th when we need it so that we can put it
5 on an airplane or whatever to have it get there.

6 THE COURT: Or, can we just go off the record a
7 second with respect to schedules so that I can -- I just don't
8 want all this on the record.

9 (Whereupon at 2:46 p.m. the Court went off the record
10 in the hearing in this matter.)

11 (Whereupon at 2:49 p.m. the hearing in this matter
12 went back on the record and the following proceedings were
13 had:)

14 THE COURT: All right, let's go back on the record
15 then. All right, the briefs are due by July 12th; is that what
16 you've decided? With hard copies sent to Mr. Bernick's New
17 York office by July 13th, and then they'll be delivered to me
18 by Mr. Bernick, somebody on his behalf, on July 14th.

19 MR. BERNICK: I think that I'm getting the sense from
20 my brethern's vibrations over here, why don't we make them due
21 on 13th at noon.

22 THE COURT: All right.

23 MR. BERNICK: Hard copies to be in our office by 5
24 o'clock, and we'll get them shipped off to you.

25 THE COURT: Okay, that's fine, and if you'll see me
after this over, I'll give you the address where they can be

1 delivered.

2 MR. FRANKEL: Your Honor, just so we're clear, the
3 business report that we talked about earlier is still due on
4 the 7th but reply by the 12th.

5 THE COURT: Right, that's correct. And then the
6 briefs are due the 13th with paper copies to me on the 14th.

7 MR. BAENA: And what we file on the 12th, we don't
8 have to make any special arrangements to deliver to you, Judge,
9 we just file it with the court?

10 MR. BERNICK: What are you planning to file?

11 MR. BAENA: A response.

12 THE COURT: Any responses to your business report.
13 Would you do the same thing, make sure that Mr. Bernick's New
14 York office has a copy by 5 p.m. on the 13th, and they can be
15 delivered to me too, just in case. I should have e-mail access
16 on the 12th, but just in case I don't. That would be a fail-
17 safe.

18 MR. BAENA: Okay.

19 THE COURT: All right, what else for today? All
20 right, if the debtor wants to submit an order that extends
21 exclusivity through that hearing on July 19th, I'll sign it,
22 otherwise this is the order, it is in effect, and debtor's
23 exclusivity is extended through that time with a corresponding
24 extension to solicit ballots for a month after whenever it
25 currently ends. Okay. Oh, the 2019 amendment; have you see

1 the orders that I entered in the Pittsburgh cases?

2 MS. BAER: Yes, Your Honor.

3 THE COURT: Are they agreeable now?

4 MS. BAER: Yes, they are.

5 THE COURT: Will you submit one, please, in this case
6 on a COC. Link it to the prior 2019 order so I can get it
7 entered, and that can take effect too.

8 MS. BAER: We will.

9 THE COURT: All right, thank you. All right, any
10 other matters? Okay we're adjourned, thank you.

11 (Whereupon at 2:51 p.m. the hearing in this matter
12 was concluded for this date.)

13
14
15
16 I, Elaine M. Ryan, approved transcriber for the
17 United States Courts, certify that the foregoing is a correct
18 transcript from the electronic sound recording of the
19 proceedings in the above-entitled matter.

20
21 Elaine M. Ryan
22 Elaine M. Ryan
23 2801 Faulkland Road
24 Wilmington, DE 19808
25 (302) 683-0221

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